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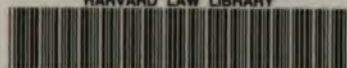
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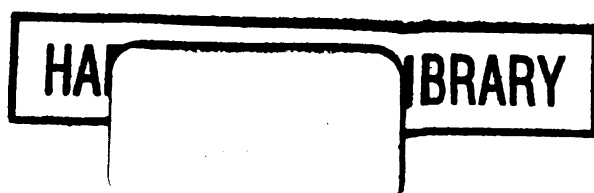
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE

OF THE
STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND STATUTES CITED AND CONSTRUED
AND AN INDEX.

By SIDNEY R. MOON,

OFFICIAL REPORTER.

DANIEL W. CROCKETT, First Asst. Reporter.

LEE W. MOON, Second Asst. Reporter.

VOL. 139.

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JUDGES
OF THE
SUPREME COURT.

OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. LEONARD J. HACKNEY. * ‡
HON. SILAS D. COFFEY. † §
HON. JOSEPH S. DAILEY. ||
HON. JAMES McCABE. ‡
HON. TIMOTHY E. HOWARD. ‡
HON. JAMES H. JORDAN. ¶
HON. LEANDER J. MONKS. ¶

* Chief Justice at May Term, 1894.

† Chief Justice at November Term, 1894.

‡ Term of office commenced January 1, 1893.

§ Term of office commenced January 7, 1889.

|| Appointed July 25, 1893, to succeed Hon. Walter Olds.

¶ Term of office commenced January 7, 1895.

(xxiii)

OFFICERS
OF THE
SUPREME COURT

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, MAY TERM, 1894, IN THE SEVENTY-
 EIGHTH YEAR OF THE STATE.

No. 16,790.

PARISH ET AL. *v.* CAMPLIN ET AL.

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REFORMATION OF INSTRUMENT.—Deed.—Description.—Mistake of Fact.
—Married Woman.—Where, by inadvertence of the scrivener in the preparation of a deed, and by mutual mistake of all the parties thereto at the time of the execution thereof, the description of the premises conveyed was erroneously stated as the “undivided three-fifths,” while the description intended and believed by the parties at the time of the execution of the deed to be duly stated therein was “the undivided four-fifths,” the deed may be reformed so as to express the mutual intentions of the parties, even though such relief be sought against a married woman.

SAME.—Mistake of Fact.—Deed.—Description.—Even if the parties knew that the deed read “three-fifths” instead of “four-fifths,” it constitutes a mistake of fact, and not a mistake of law, if the parties really thought the deed sufficient to convey the “four-fifths,” and would entitle the plaintiff to a reformation in that respect.

SAME.—Mistake of Fact.—Mistake of Law.—Relief.—Deed.—Omission of Grantor's Name from Body of.—Equity requires such amendment of a writing (a deed) as will make the contract (the conveyance) what the parties supposed it was, and intended it should be, whether the mistake be one of law or of fact. So, where one of the grantors, a married woman, and her husband, joined in the execution of the deed, but their names do not appear in the body thereof, and appear only where they signed it and in the certificate of acknowledgment by the notary, the deed should be reformed so as to express the mutual intentions of all the parties.

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PARTITION.—Tenants in Common.—Valuable Improvements.—When Entitled to Compensation.—Where one tenant in common makes necessary, valuable and lasting improvements, he is entitled to compensation therefor, on partition.

From the Hendricks Circuit Court.

J. A. Abbott, J. G. Miles and E. A. Miles, for appellants.

M. W. Hopkins, for appellees.

MCCABE, J.—The appellants sued the appellees for partition of certain lands in Boone county.

The venue of the cause was changed to Hendricks county. After overruling a demurrer to the cross-complaint, and issues thereon and on the complaint were formed, the cause was submitted to the court for trial without a jury, and the court, on proper request, made a special finding of the facts, and stated its conclusions of law thereon.

The court rendered judgment on the finding over a motion by appellants Francis M. Parish and Mary M. Goodwine, for judgment in their favor on the special finding, over a motion by them for a new trial.

The errors assigned call in question the conclusions of law and the other rulings mentioned.

The substance of the special finding is as follows:

1st. That in the year 1846, George Parish died intestate in Boone county, Indiana, the owner, in fee-simple, of 120 acres of land in said county, of which the land in controversy was a part, and which last mentioned land had been assigned to his widow as dower.

2d. That said George left surviving him his widow, Eliza Parish, and six children, to wit: Francis M., Emily E., Mary M., Thomas, Malinda J., and John H. Parish, his only heirs at law. Emily E. afterwards married, and is now the wife of James W. Kersey. Mary

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M. afterwards married Moses F. Goodwine. Malinda J. afterwards married the defendant Joseph H. Camplin, and, on the 20th day of April, 1879, died intestate, without issue, leaving her said husband her only heir. Said Thomas Parish died intestate, without issue, and leaving no widow, in the year 1863. Said Eliza Parish died on the 4th day of August, 1890, intestate. Said other children of George Parish are living, and parties herein.

3d. That in the spring of the year 1871, about the time of his marriage with Malinda J. Parish, the defendant Joseph H. Camplin entered into an agreement with Eliza Parish and the then living heirs of George Parish, who were all of full age and competent to contract, to live upon the tract of land above described, and thereon provide a home for said Eliza Parish during her natural life; that not desiring to remain on said land and improve the same without having title thereto, he so informed said heirs, and because of said agreement and the further consideration of \$150 to be paid to each of said heirs, they each one acting separately for himself or herself, agreed, in parol, to convey to him all their respective interests in said real estate, he, the said Camplin, to procure the necessary deeds of conveyance and pay the expense in the execution thereof. The said Mary M. Goodwine being, at the time of said agreement, and ever since, a married woman and a resident of the State of Missouri. The agreement among said children to convey to Camplin embraced no agreement on the part of the widow, Eliza Parish, to part with any interest she had in the land, but it was at the time believed by her and each of said children and Camplin, that she had no interest in said land beyond a life estate.

4th. That in February, 1872, said Camplin, pursuant to said agreement, procured one Davis, a notary public, to prepare a deed of conveyance, and gave said Davis the

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names of all the grantors, to wit: Francis M. Parish and wife, Almira; Emily E. Kersey and husband, James W.; John H. Parish and wife, Mary; Mary M. Goodwine and husband, Moses F., which deed recites in the body thereof that Francis M. Parish and Elmira, his wife; Emily E. Kersey and James W. her husband, and John H. Parish and Mary, his wife, in consideration of \$450, convey and warrant to Joseph H. Camplin the undivided three-fifths of the northwest quarter of the northwest quarter of section 2 in township 18 north and range 1 west containing $41\frac{72}{100}$ acres, more or less. Mary M. Goodwine and Moses F. Goodwine, her husband, were not named in the body of said deed. The persons named in the body of said deed as grantors duly signed and acknowledged the execution thereof, and delivered the same to Camplin on the 7th day of February, 1872, and at the time of delivery each of the three children named as grantors received from Camplin \$150, the consideration theretofore agreed upon; that none of said grantors had anything to do with the preparation of said deed or any knowledge as to its contents until they were called upon to execute it, but each of them voluntarily executed the same without objection and in pursuance of said verbal agreement theretofore made, and each intending thereby to convey all his or her interest in said $41\frac{72}{100}$ acres, which, at the time, each believed, and Camplin also believed, was an undivided one-fifth thereof, subject only to the life estate of Eliza Parish, said deed being in the words and figures following, to wit: "This indenture witnesseth, that Francis M. Parish and Almira, his wife; Emily E. Kersey and James W. Kersey, her husband, and John H. Parish and Mary Parish, his wife, of Boone county, in the State of Indiana, convey and warrant to Joseph H. Camplin, of Boone county, in the State of Indiana, for the sum of four hundred and

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fifty dollars, the following real estate in — county, State of Indiana, to wit: the undivided three-fifths of the northwest quarter of the northwest quarter of section two (2), in township eighteen (18) north, of range one (1) west, containing $41\frac{73}{100}$ acres more or less.

“In witness whereof the said Francis M. Parish and Almira Parish, his wife; Emily E. Kersey and James W. Kersey, her husband; John H. Parish and Mary Parish, his wife, have hereunto set their hands and seals, this seventh day of February, A. D. 1872.

“FRANCIS M. PARISH (Seal).

“ALMIRA PARISH (Seal).

“EMILY E. KERSEY (Seal).

“JAMES W. KERSEY (Seal).

“JOHN H. PARISH (Seal).

“MARY E. PARISH (Seal).

“MARY M. GOODWINE (Seal).

“MOSES F. GOODWINE (Seal).”

Then follows a certificate of acknowledgment taken by Francis M. Davis, a notary public in and for said Boone county, on the part of all the foregoing parties except Mary M. Goodwine and Moses F. Goodwine, showing the relation of husband and wife, dated the same day. And then follows another certificate of acknowledgment taken by Solomon Witt, a justice of the peace in and for said county, dated August 21st, 1872, on part of Mary E. Parish, wife of John H. Parish.

Then follows another certificate of acknowledgment on part of Moses F. Goodwine and Mary M. Goodwine, his wife, taken by the county clerk of Clark county, Missouri, on the 12th day of October, 1874.

4th. That at the time of the execution of said deed, on the 7th day of February, 1872, by Francis M. Parish and wife, John H. Parish and wife, and Emily E. Kersey and husband, as heretofore found, Mary M. Goodwine re-

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sided, and still resides, with her husband in the State of Missouri; that in 1874 said Camplin, having procured the money with which to pay Mrs. Goodwine, did pay her \$150, the consideration agreed upon in 1872, as before found, for her interest in said $41\frac{72}{100}$ acres, and also further paid her \$8 as interest for the delay of the \$150, and sent to Mrs. Goodwine, in Missouri, the deed executed by her brothers and sisters, as before found, with instructions for her and her husband to sign and acknowledge that deed or execute a separate deed conveying her interest in said $41\frac{72}{100}$ acres to Camplin; that Mrs. Goodwine and her husband, Moses F. Goodwine, signed and acknowledged said deed, as parties thereto, before the clerk of the county court of Clark county, Missouri, on the 12th day of October, 1874, and returned and delivered the same to the said Camplin, who caused the same to be recorded in deed record No. 28 * * in the office of the recorder of Boone county, Ind., on the 11th day of November, 1878.

5th. That at the time Mrs. Goodwine and her husband signed and acknowledged said old deed, and at no other time was her name and the name of her husband, nor either of them, written in the body of said deed as grantors, nor was there any change made in the description of the premises or quantity conveyed, but they both, by the signing and acknowledging and delivering of said deed to Camplin, intended thereby to convey to him, Camplin, all the interest of said Mary M. Goodwine in the said $41\frac{72}{100}$ acres, which interest the said Goodwine and also the said Camplin at the time believed was an undivided one-fifth thereof, subject only to the life estate of the said Eliza Parish, and which deed at the time of signing, acknowledging, and delivering of the same, the said Goodwines and the said Camplin understood and believed was duly executed, to sufficiently and fully carry

out their purpose as a conveyance of title with full covenants, to an undivided one-fifth of said $41\frac{72}{100}$ acres.

6th. That by inadvertence of the scrivener in the preparation of said deed, and the mutual mistake of all the parties in the execution thereof, the names of Mary M. Goodwine and Moses F. Goodwine were omitted, as grantors, in the body of said deed. And, by the further inadvertence of the scrivener in the preparation of said deed and the mutual mistake of all the parties thereto, at the time of the execution thereof, the description of the premises conveyed was erroneously stated as the undivided three-fifths * * *, while the description of the premises intended and believed by the parties, at the time of its execution, to be duly stated in said deed, was as follows: "The undivided four-fifths of the northwest quarter of the northwest quarter of section 2, in township 18 north, of range 1 west, containing $41\frac{72}{100}$ acres, more or less."

7th. That from March, 1871, till February, 1880, said Camplin continued to live upon said real estate. In April, 1879, his wife died, and in November, 1879, the widow, Eliza Parish, gave him a written notice to quit possession of said real estate, and, in compliance with said notice, he yielded possession of said $41\frac{72}{100}$ acres to the widow, in February, 1880; that upon the death of the widow, August 4, 1890, the said Camplin took possession of said land, and has continuously since held the possession thereof, under claim of absolute ownership.

8th. That while occupying said land, and before the death of the widow, the defendant Camplin made necessary, lasting, and valuable improvements on said land, of the present value of \$440.

9th. That in 1873 the Anderson, Lebanon and St. Louis R. R. was located and graded through said land, and

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Camplin received from the owners of said railroad \$225 as damages to said tract of land.

10th. That said tract of land is not susceptible of partition without material injury to the same.

The foregoing facts are all within the issues formed on the complaint and cross-complaint.

The conclusions of law are as follows:

"1st. That the defendant, Joseph H. Camplin, on his cross-complaint, is entitled to have the deed described in his cross-complaint reformed, so as to duly and sufficiently show a conveyance to him with full covenants of warranty from Francis M. Parish and Almira Parish his wife, Emily E. Kersey and James W. Kersey her husband, John H. Parish and Mary Parish his wife, Mary M. Goodwine and Moses F. Goodwine her husband, of the real estate, as intended by all the parties above described, so as to convey the undivided four-fifths thereof to him.

"2d. That the plaintiffs, Francis M. Parish and Mary M. Goodwine, and the defendants, Joseph H. Camplin, John H. Parish and Emily E. Kersey, are the owners in fee and tenants in common of the lands described in the complaint.

"3d. That the plaintiffs, Francis M. Parish and Mary M. Goodwine, and the defendants, John H. Parish and Emily E. Kersey, are each the owners and entitled to a share in said real estate equal in value to $\frac{1}{5}$ part thereof, and the defendant, Joseph H. Camplin, is the owner and entitled to a share of the same equal in value to $\frac{4}{5}$ parts thereof.

"4th. That said defendant Camplin is entitled to a lien on said real estate for the sum of \$440, less \$225, received by him from the railroad company as damages in railroad construction, for necessary, lasting and valuable improvements placed by him on said real estate.

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"5th. That the defendant Camplin is not entitled to have his title quieted on his cross-complaint.

"6th. That there ought to be a commissioner appointed to sell said real estate."

The same question involved in the action of the court in overruling the demurrer to the cross-complaint is involved in the exceptions to the conclusions of law.

It is therefore unnecessary to inquire into the correctness of the ruling of the court in overruling the demurrer to the cross-complaint, especially as the appellants' counsel admit that the cross-complaint makes a stronger case for reformation than the facts found do. *State, ex rel., v. Vogel*, 117 Ind. 188; *Martin v. Cauble*, 72 Ind. 67; *Douthit v. Douthit*, 133 Ind. 26; *Reddick v. Keesling*, 129 Ind. 128.

The principal controversy is over the first conclusion of law stated, to the effect that appellee Camplin is entitled to a reformation of the deed. It is contended by appellants that because the names of Mary M. Goodwine and her husband were left out of the body of the deed, it was no deed at all as to her, and it could not be reformed, and they cite *Cox v. Wells*, 7 Blackf. 410, in support of that proposition. It was held in that case, and we think correctly, that a deed tendered under a contract to execute a deed with relinquishment of dower, which did not contain the name of the wife in the body of the deed was insufficient. But there was no claim of mistake in that case, and no attempt at reformation. The other cases cited by appellants have no application here.

It is contended by appellants that the deed of a married woman can not be reformed on account of a mistake, except as to a matter of mere description of the premises intended to be conveyed, and they cite a large number of cases in this court to the effect that equity affords

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no relief against such a mistake. *Hamar v. Medsker*, 60 Ind. 413; *Carper v. Munger*, 62 Ind. 481; *McKay v. Wakefield*, 63 Ind. 27; *Wilson, Admr., v. Stewart*, 63 Ind. 294; *Baxter v. Bodkin*, 25 Ind. 172; *Shumaker v. Johnson*, 35 Ind. 33; *Behler v. Weyburn*, 59 Ind. 143; *Dunn v. Tousey*, 80 Ind. 288; *Travellers' Ins. Co. v. Noland*, 97 Ind. 217. But none of these cases holds that a married woman's deed can not be reformed for other mistakes than those of description of the premises intended to be conveyed.

If the deed of a married woman may be reformed on account of a mistake in the description of the premises or estate, or interest intended to be conveyed, as is decided in the cases cited, no good reason is perceived why it may not be reformed as to other mistakes therein. This is not a case like *Baxter v. Bodkin*, 25 Ind. 172; *Stevens v. Parish*, 29 Ind. 260, and other cases referred to by appellants' counsel where the defect in the conveyance sought to be cured was the failure of the husband to join in the deed of his wife. Such a defect can not be cured either by equity or by the voluntary action of the husband in the execution of another separate deed on his part to the same person for the same premises as those contained in the wife's deed. The reason of this is that the statute provides that the "wife shall have no power to encumber or convey such (her) lands except by deed in which her husband shall join." 3 Burns' R. S. 1894, section 6961; R. S. 1881, section 5116. Those cases correctly hold that on account of that statute the separate deed of the wife is absolutely void. If the instrument is absolutely void, it is as if it never had been written, or signed. In that case to reform it would be to make a deed for her, by a court of equity, that she never made, and no part of which she ever made.

Here the defect does not arise out of the fact that the attempted conveyance was one which a statute expressly forbids, and renders therefore absolutely void. The attempted conveyance was in all respects lawful had the contract been carried out without the intervention of a mistake. It has been held by this court that a mistake in a deed of a married woman may be reformed so as to make it conform to the intention of the parties thereto, and that such reformation is not the making of a new contract by the court for her, which she herself has not made, as contended by appellants. *Styers v. Robbins*, 76 Ind. 547; *Comstock v. Coon*, 135 Ind. 640. The cases on the subject of reformation as to the description of the estate or interest intended to be conveyed, already cited above, fully justify the conclusion of law that the deed ought to be reformed so as to make it a conveyance of the undivided four-fifths. And even though the parties may have known that the deed read three-fifths instead of four-fifths, those cases hold that it would constitute a mistake of fact, and not a mistake of law, if the parties really thought the deed sufficient to convey the four-fifths, and would entitle the appellee Camplin to a reformation in that respect. The finding is that they did all so believe.

But it is contended, with much zeal and ability on behalf of appellants, that the omission of the names of Mary M. Goodwine and her husband from the body of the deed rendered it a mere nullity as to them, and hence there could be no reformation as to them; and to reform the deed in that respect would amount to the making of a contract or deed for Mrs. Goodwine and her husband which they never themselves made.

Many authorities are cited to the effect that the grantor's name must be in the body of the deed, or it will be void. We do not stop to determine whether that is the

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legal effect of leaving out of the body of the deed the name of the grantor or not; if it was competent and proper to reform the deed so that the names of the Goodwines would appear therein, as was done, that is sufficient to uphold the judgment of the trial court.

That question has been settled by this court against appellants, in *Collins v. Cornwell*, 131 Ind. 20. In that case a married woman had undertaken to mortgage her real estate for money borrowed by herself. Her husband joined with her in the execution of the mortgage, but his name nowhere appeared in the body thereof, and appeared only where he signed it with his wife and in the certificate of acknowledgment by the notary public, just as in the case at bar. The mortgage was reformed on the ground that the husband's name had been omitted by the mutual mistake of all the parties. See, also, *Calton v. Lewis*, 119 Ind. 181.

It is further contended by appellants that if there was any mistake about the omission of the names of Mrs. Goodwine and husband, it was a mistake of law and not of fact, and that, therefore, there can be no reformation as to that matter.

The special finding shows that a valid contract was made by Camplin to purchase the interests of the other four living heirs and tenants in common for \$150 apiece; and that appellee Camplin employed a notary public to draw up a deed to convey the four shares of the four heirs whose names, with the wife or husband of each, were furnished with directions to draw up a deed accordingly; that by the mistake of the notary, he only embraced those of the heirs who lived in the vicinity, in the deed, and by a like mistake he omitted the one who lived in Missouri, and also omitted the description of her interest in the real estate, and that the appellee sent the purchase-price of her interest and the deed to Mrs. Good-

wine, in Missouri, with directions for her and her husband to execute a new deed for her interest, or sign and acknowledge the one sent, which latter they did, and returned and delivered it to appellee Camplin, both the Goodwines and Camplin believing that the deed was duly executed so as to sufficiently carry out their purpose to convey to Camplin the undivided one-fifth of Mrs. Goodwine, as well as the other three-fifths of the other three heirs.

But it is contended that there is no finding of fact that the Goodwines and Camplin were all really mistaken as to the names of the Goodwines being in the body of the deed, and that for aught that appears in the special finding, they may have all known that the names of the Goodwines were omitted from the body of the deed, and have believed the deed sufficient to convey Mrs. Goodwine's interest, and that that would be the legal effect of such a deed. If so, that would be a mistake of law against which equity, as a general rule, does not relieve. But our construction of the whole special finding is that the Goodwines and Camplin were all laboring under the mistake that the Goodwines' names were in the body of the deed. The other parties to the deed knew nothing about it so far as it affected the Goodwines. The reformation did not affect any of the other parties to the deed, and hence it was not material whether they did or did not know that the Goodwines' names were not in the body of the deed.

But if we were to construe the special finding to the effect that the Goodwines and Camplin knew that the names of the Goodwines were not in the body of the deed, yet that would not preclude the right to reformation on the ground that their mistake was one purely of law. There are exceptions to the rule that denies relief in equity from a mistake of law.

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If this was a mistake of law, a mistake as to the legal effect of the deed, it was such an one as was common to all the parties affected.

"It has been said that whenever a mistake of law is common to all the parties, where they all act under the same misapprehension of the law, and make substantially the same mistake concerning it, this is a sufficient ground, without any other incidents, for the interposition of equity." 2 Pom. Eq. Jur., section 846.

Eastman v. Provident, etc., Ass'n, 65 N. H. 176, was a suit in equity to reform a certificate of membership in a life insurance association issued to one Gigar. The application for the policy was made to defendant's clerk, who was also one of its trustees, authorized to approve applications. The applicant asked this clerk what would be the effect if no beneficiary were named in the certificate, and on being informed that it would then be payable to his administrator as a part of his estate, replied that was what he desired. The certificate was, therefore, left blank, instead of making it payable to his administrator.

The court said: "Both parties intended to make the benefit payable to Gigar's administrator. That it was not made payable to him was due to their mutual misapprehension of the legal effect of the language used in the certificate." *Eastman v. Provident, etc., Ass'n, supra*.

Equity requires an amendment of the writing that will make the contract what the parties supposed it was, and intended it should be, although their mistake is one of law and not of fact. *Eastman v. Provident, etc., Ass'n*, 23 Am. St. Rep. 29; *Kennard v. George*, 44 N. H. 440; *Stedwell v. Anderson*, 21 Conn. 139; *Woodbury Savings Bank v. Charter Oak, etc., Ins. Co.*, 31 Conn. 517 (529).

Another qualification of the exception is that: "If a

man, through misapprehension or mistake of the law, parts with or gives up a private right of property or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake can not, in conscience, retain the benefit or advantage so acquired." *Bales v. Hunt*, 77 Ind. 355; *Kerr Fraud and Mistake*, 398, and notes.

We, therefore, hold that the first conclusion of law was not erroneous, and it follows that there was no error in the second and third conclusions, for their correctness is conceded if the first is correct.

The fourth conclusion of law relates to Camplin's right to compensation for improvements against the other tenants in common. Where one tenant in common makes necessary, valuable and lasting improvements, on partition he is entitled to compensation. *Martindale v. Alexander*, 26 Ind. 104; *Elrod v. Keller*, 89 Ind. 382; *Lane v. Taylor*, 40 Ind. 495.

That is the character of the improvements that the court finds appellee made.

But it is objected that Camplin was not in possession as owner or tenant in common, but as tenant of the life tenant, and the duty of making these improvements as life tenant without compensation against the holders of the fee, or remaindermen was devolved on him by law. It is true the law imposes the duty upon the life tenant to pay the taxes and keep up the repairs, and he can not make improvements at the expense of the remainderman whether necessary or not. *Miller v. Shields*, 55 Ind. 71; *Clark v. Middlesworth*, 82 Ind. 240.

But the finding shows that the surviving widow and children of George Parish, deceased, in good faith supposed that such widow had and held no other interest in

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said real estate than a life estate, and that the five children living at the time appellee Camplin, husband of one of them, bought out the other four, and that Camplin, in good faith, so believed. This supposition was correct up to the time of the death of Thomas Parish, one of the six children left by said George Parish. But, contrary to the belief, in good faith, entertained by all of them, at the death of Thomas Parish, one-half of his one-sixth interest descended to his mother and the other half to his brothers and sisters. 2 Burns' R. S. 1894, section 2624, R. S. 1881, section 2469.

When the improvements were made, the appellee Camplin, and all the parties, believed he had become the owner of all the interests in fee, except his wife's, and in that belief made the improvements, he having at the time, as he thought, secured the life estate of his mother-in-law. On the death of his wife, his mother-in-law ordered him to quit the premises, which he did.

In *Carver v. Coffman*, 109 Ind. 547, it was held that a person in possession under a *bona fide* claim of ownership of the entire estate, who made valuable, lasting, and necessary improvements, was entitled to compensation therefor against one who afterwards turned out to be the owner of an undivided interest in the estate. 17 Am. & Eng. Encyc. of Law, 760, 761, and authorities there cited.

We hold, therefore, that there was no error in the fourth conclusion of law. It follows, from what we have already said, that there was no error in overruling appellants' motion for judgment on the special finding in their favor.

It is lastly contended by the appellants, that the evidence is insufficient to support the finding, and that, therefore, the court erred in overruling the motion for a new trial.

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We have examined the evidence, and think it fully warranted the deductions and inferences the court has drawn therefrom, and is sufficient to support the finding; therefore, there was no error in overruling the motion for a new trial.

We find no error in the record, and the judgment is, therefore, affirmed.

Filed May 29, 1894; petition for a rehearing overruled Sept. 25, 1894.

 No. 16,905.

BRONNENBURG v. O'BRYANT ET AL.

HIGHWAY.—*Proceeding to Locate and Open.*—*Remonstrance.*—*Nature and Effect of.*—A remonstrance in a proceeding to locate and open a highway is in the nature of an answer to the petition, and raises the issue to be disposed of before the county board, and upon appeal to the circuit court.

SAME.—*Amendment of Petition.*—*When Properly Made.*—*Presumption.*—After the proceedings have been instituted, and before the question of jurisdiction is determined, it is clearly within the discretion of the board to permit an amendment of the petition, and where the contrary is not made to appear, it will be presumed that the amendment was properly made.

SAME.—*Viewers.*—*Appointment.*—*Oath.*—*Inference.*—Where it appears that viewers were appointed, and their report shows that they were sworn, it will be inferred that they were sworn to do the thing they were appointed to do.

SAME.—*Viewers.*—*Report by Two.*—A report by two viewers is sufficient.

SAME.—*Locating and Opening.*—*Affecting Two Counties.*—*Damages, How Paid.*—In a proceeding to locate and open a highway in two counties, the damages declared assessed shall be paid equally by both counties.

SUPREME COURT PRACTICE.—*Evidence not in Record.*—*Questions Depending Upon.*—Questions depending upon the evidence can not be decided where the evidence is not in the record.

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From the Madison Circuit Court.

W. A. Kittinger, L. M. Schwinn and E. E. Hendee, for appellant.

E. B. Goodykoontz and G. M. Ballard, for appellees.

DAILEY, J.—This was a proceeding originally brought by petition, before the board of commissioners of Madison county, for the purpose of locating and opening a highway in the counties of Madison and Delaware. The appellant appeared before the board, and became a remonstrant, and by his attorneys filed various motions to dismiss the proceeding, and to reject the reports of the viewers and reviewers; all of said motions were overruled by the board, and a final order establishing the road was made and an award of damages to the appellant. Thereupon an appeal was taken by him to the circuit court, where the same motions were refiled, presented to and overruled by the court, trial was had, resulting in a finding for the petitioners. The road was ordered established and damages were assessed in favor of the appellant in the sum of \$225. There was an order of payment, and the matter referred back to the board for further proceedings in accordance with the finding and judgment of the court. From this decision an appeal is prosecuted. There are nine specifications of error by the appellant, but we will only consider such as have been discussed by counsel, the others having been waived.

One error complained of is, "That neither the board of commissioners, nor the circuit court that tried said cause, had jurisdiction of the subject-matter of said cause."

It is clear that the law does not sustain this contention. Sections 5001 and 5002, R. S. 1881; Burns' R. S. 1894, sections 6726 and 6727, expressly confer juris-

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diction upon the board of commissioners in all such matters.

Section 5027, R. S. 1881; Burns' R. S. 1894, section 6754, provides that "Any person aggrieved by any decision of any board of commissioners may appeal therefrom to the circuit court of such county, etc."

The appellant does not assign as error that the court had no jurisdiction of the persons affected, and such question is not before us for our consideration.

It is urged that the board, in order to obtain jurisdiction, should have found as a separate fact, that the twenty-four freeholders lived in Madison county, and that six of them lived in the immediate neighborhood of the proposed highway. An examination of the record discloses that the court found for the petitioners as to the public utility of the contemplated road, ordered the same opened to the width of thirty feet, and found for the remonstrant on his claim for damages, and awarded a judgment accordingly.

In our opinion, the finding and judgment cover all the issues presented in this case. The only issue tendered by the remonstrance and submitted to the court, related to the utility of the road and the question of damages. It follows, therefore, that there was a complete finding upon all matters pertinent to the issues. It is a familiar rule of law that a remonstrance is in the nature of an answer to the petition, and raises the issue to be disposed of before the county board, and upon appeal to the circuit court. *Schmied v. Keeney*, 72 Ind. 309.

If appellant desired to contest the question as to whether the petition was represented by the requisite number of freeholders of Madison county, it should have been presented by the remonstrance.

Another specification of error is that "the court erred in overruling the motion to dismiss all the proceedings

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before the board of commissioners of Madison county." In support of this, appellant's counsel contend that the board of commissioners of Delaware county, upon motion or remonstrance, had found against the petitioners. The fact that the evidence is not in the record, furnishes a cogent reason why the question can not arise in this court, and, in its absence, we must indulge no presumption against the regularity of the proceedings in that county.

Complaint is made that the court erred in overruling the motion to dismiss the petition, because it is claimed that new names were added thereto without the consent of the court. It seems the board permitted it to be done and acted upon it as if it had been their order, and the inference is that leave was granted and the new names properly affixed.

After the proceedings had been instituted, and before the question of jurisdiction was determined, it was clearly within the discretion of the board to permit the amendment of the petition, and there was no error in overruling the motion to dismiss.

Error is also predicated on the overruling of appellant's motion to strike out the report of the reviewers, because the report shows that it was made by two of the reviewers instead of three; and it is not shown what they were sworn to do. It appears that they were appointed to review the road, and the report shows that they were sworn. In such case, the fair inference would be that they were sworn to do the thing they were appointed to do. The objection made is entirely too technical. It is now well settled by this court that a report made by two of the viewers or reviewers is sufficient. *Hays v. Parrish*, 52 Ind. 132; *Scraper v. Pipes*, 59 Ind. 158 (164 and 165).

The appellant's motion for a new trial, for the reason

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that the verdict is not supported by sufficient evidence and is contrary to law, is not available, for the reason that the evidence is not in the record.

Another assignment of error is that the court erred in overruling the appellant's motion to modify the judgment. Under this specification, it is contended that the court ought not to have taxed the damages awarded the appellant, to be paid by both counties. We do not see how the appellant is in a position to complain of a judgment assessed against the two counties, inasmuch as all his lands are shown to be situated in Madison county, and his burdens as a taxpayer would be lessened by such order. The court was clearly right in what it did, as section 5012, R. S. 1881, provides that "the damages declared assessed shall be paid equally by the counties interested."

The appellant's motion to modify the judgment by inserting an order that the road is not to be opened until the payment of damages, possesses little merit. The court ordered the damages paid as the statute requires, and then directed the commissioners to order it opened. We perceive nothing in this order that can injure the appellant. The damages allowed must be paid before the road is opened. *Board, etc., v. Small*, 61 Ind. 318.

Although the judgment is informal, it is not erroneous nor misleading in this respect.

In looking into the whole record, we perceive no error which authorizes a reversal; the judgment will, therefore, be, and it is, affirmed.

Filed Oct. 16, 1894.

Case et al. v. Owen et al.

No. 16,981.

CASE ET AL. v. OWEN ET AL.

DEED.—Conveyance.—Joint Tenancy.—Real Estate.—Where the *premises* and the *habendum* of a deed are, that B. W. and R. W. of Hamilton county, and State of Indiana, *convey* and *warrant* to L. R. and J. R., *jointly*, of Hamilton county, in the State of Indiana, etc., the word “jointly” creates in the grantees a joint tenancy.

From the Hamilton Circuit Court.

L. O. Clifford, T. J. Kane and R. K. Kane, for appellants.

J. A. Roberts and M. Vestal, for appellees.

COFFEY, J.—The only question involved in this case relates to the construction of the following deed, viz:

“*This indenture witnesseth*, That Barney White and Ruth White, of Hamilton county, and State of Indiana, *convey* and *warrant* to Lydia Reese and John Reese, jointly, of Hamilton county, in the State of Indiana, for the sum of fifteen hundred ninety-seven dollars and fifty cents, the following real estate in Hamilton county, to wit: (Here follows description.) In witness whereof, etc.”

It is contended by the appellants, that under this deed, Lydia Reese and John Reese took as tenants in common, while the appellees contend that they took as joint tenants.

An estate in joint tenancy is an estate held by two or more tenants jointly, with an equal right in all to share in the enjoyment of the land during their lives. Upon the death of any one of the tenants, his share vests in the survivors. Four requisites must exist to constitute a joint tenancy, viz:

First. The tenants must have one and the same interest.

139	22
144	6
139	22
154	86
d154	87
139	22
165	207

Second. The interests must accrue by one and the same conveyance.

Third. The interests must commence at one and the same time.

Fourth. It must be held by one and the same undivided possession. 6 Am. and Eng. Encyc. of Law, 891.

A joint tenancy can be created in no other way than by purchase, and its distinguishing feature is that of survivorship.

The doctrine of joint tenancy is not favored by the American law, and the rules relating to such estates have been greatly modified by statute in most of the States of the Union.

Our statute, section 3341; Revision of 1894, provides that all conveyances and devises of land, or of any interest therein, made to two or more persons shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

This statute completely reverses the ancient common law rule, for joint tenancy was a favorite of the ancient common law, and no special words or limitations were necessary to call it into existence, but, on the other hand, words or circumstances of negation were indispensable to avoid it. Freeman Cotenancy and Partition, section 18.

Under this statute, however, it must be created by express words or limitations.

The question for our decision, therefore, is, does the use of the word "jointly" in this deed have the effect of vesting in Lydia Reese and John Reese an estate in joint tenancy?

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It is a familiar rule that in construing a deed, as in construing any other written instrument, it is to be considered as a whole, and that effect is to be given to each and every clause and word found in it if that is possible.

As tenants in common are two or more persons who hold possession of any subject of property by several and distinct titles the word "jointly" can find no place in describing an estate to be held by them.

To hold that this deed created in the grantees a tenancy in common, we would be compelled to strike out and wholly reject the word "jointly."

This we are not at liberty to do. Under the well known rules of construction we are required to give it effect; and when that is done we are constrained to hold that this deed vested in Lydia Reese and John Reese an estate in joint tenancy. *Barden v. Overmeyer*, 134 Ind. 660; *Thornburg v. Wiggins*, 135 Ind. 178.

As this is in accord with the conclusion reached by the circuit court, the judgment should be affirmed.

Judgment affirmed.

Filed Oct. 18, 1894.

No. 16,968.

THE BALTIMORE AND OHIO AND CHICAGO RAILROAD
COMPANY v. EGGERS.

ACTION.—Dismissal for Want of Prosecution.—Regular Judge Disqualified.—Presumption.—Where the regular judge is disqualified to act, it is no excuse for failure to prosecute the case, where the case was dismissed by special judge for want of prosecution, after pending more than two years. It will be presumed that plaintiff's counsel knew of the statutes for the trial of causes where the regular judge is disqualified.

SAME.—To Reinstate a Cause Dismissed for Want of Prosecution, Contra-

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ry to Agreement.—In an action to reinstate a cause dismissed for want of prosecution, the complaint that the case was dismissed contrary to agreement, is not sufficient where it is not shown that the agreement was one between the parties to the action.

PRACTICE.—Default by Litigant.—Rule or Order of Court.—A litigant can only be in default when he fails to discharge or satisfy some rule or order of the court entered against him.

From the Lake Circuit Court.

J. H. Collins, for appellant.

J. W. Youche and *E. D. Crumpacker*, for appellee.

DAILEY, J.—This is a proceeding under section 396, of the R. S. 1881, to set aside an order of dismissal of a cause pending in the Lake Circuit Court, wherein appellant was plaintiff and appellee was defendant.

It appears from the complaint herein that the appellant purchased a parcel of land in Lake county, Indiana, for right of way in June, 1881, and when it undertook to take possession of the said land and construct a fence along a line thereof, the appellee interfered and prevented it and claimed ownership of the land; that on the 8th day of August, 1888, appellant commenced an action in said court against appellee, to enjoin him from interfering with appellant's possession and use of the land; that afterwards appellant's grantor commenced an action in said court against appellee to determine the title and possession of said property, and it was "agreed and understood" that appellant's said action should stand upon the dockets of said court until the other suit had been determined; that pursuant to said agreement appellant's action was continued from term to term until September, 1890, when it was dismissed, but appellant did not learn of said dismissal until nearly two years thereafter. It is also alleged that Hon. William Johnson, who was judge of the Lake Circuit Court when the cause was dismissed, was one of the appellant's counsel in the orig-

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inal action, and Hon. Johannes Kopelke was appointed special judge for the purpose of hearing this case, and made the order of dismissal.

The court below overruled the motion to set aside the dismissal, and this appeal brings in review that decision of the court.

It is undisputed that from the time appellant commenced its action in August, 1888, until the September term, 1890, no steps were taken to prosecute it whatever. It is clear that in the absence of some agreement to justify it, such treatment of the action by the appellant is inexcusable, and such negligent conduct as the law will not tolerate. But two grounds are taken upon which appellant relies to show mistake, inadvertence or excusable neglect:

First. That the presiding judge was disqualified, and appellant supposed the cause would not be disposed of until his term of office expired.

Second. An agreement by which appellant's cause was to stand until the other cause was determined.

We must indulge the presumption that appellant's counsel knew of the statutes for the trial of causes when the judge is disqualified to act. There was nothing in the fact that two years after the action commenced the regular judge appointed a special judge to try the cause, and such special judge made an order of dismissal, to justify appellant's conduct in neglecting the suit. The other question was purely one of fact to be determined by the court upon the evidence. The only testimony in relation to it, introduced by the appellant, is the verified complaint and affidavit of its counsel, wherein it is claimed that it was "agreed and understood" that appellant's case should remain on the dockets of the court until the other cause was decided, but it is not shown who made or who were parties to the agreement or un-

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derstanding. Appellant does not claim that it was had with the appellee or any one authorized to act for him, but, on the contrary, appellee and his attorneys all testify positively that no arrangement, agreement or understanding was made respecting said action, and the court so found in accordance with the evidence.

There is no conflict in the evidence, because there is no testimony on either side showing, or tending to show, an arrangement of any kind with the appellee, or any one on his behalf respecting the case. True, the appellee filed no answer in the original case, but he was not in default, as no rule had been taken against him. A litigant can only be in default when he fails to discharge or satisfy some rule or order of the court entered against him.

In the present case the proceeding is summary, and no answer is contemplated by the practice act. *Douglas v. Keehn*, 78 Ind. 199.

We perceive no error in the judgment of the trial court, and its judgment is affirmed.

Filed Oct. 30, 1894.

No. 16,859.

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139 27
164 348

FRAUDULENT CONVEYANCE.—*Property Sufficient From Which Debts May be Enforced at Time of Conveyance.*—If, at the time a conveyance is made by a debtor, he retain property sufficient to pay his debts, and from which the debts may be enforced, upon execution, his conveyance is not fraudulent as to creditors, and his subsequent insolvency would not cause such conveyance to be set aside.

From the Benton Circuit Court.

D. Fraser and W. Isham, for appellants.

G. H. Gray, for appellee.

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HACKNEY, C. J.—This was a suit by the appellee to set aside, as fraudulent, certain conveyances of real estate made by the appellant James Emerson, to his wife and co-appellant. The questions for review arise upon the special finding of facts and conclusions of law rendered by the lower court. Said facts are, in substance, that on December 24, 1890, the appellant James was indebted to the appellee in the sum of \$1,037.60, and on said day was the owner in fee simple of several tracts of land of the value of three thousand dollars, and of certain personal property consisting of live stock and agricultural implements of the value of one thousand dollars. On said day, without consideration, and with intent to cheat and defraud the appellee, said James conveyed to his wife the west half of the southeast quarter of the southeast quarter of section 36, township 25, range 7 west, in Benton county, of the value of seven hundred dollars, and thereafter, on the 14th day of April, 1891, conveyed to her, without consideration, and with like intent, the southeast quarter of the northeast quarter of said section, of the value of twelve hundred dollars. In addition to the lands so conveyed, said James was the owner in fee simple of certain tracts of the value of eleven hundred dollars, and was indebted, in addition to said sum owing to the appellee, the sum of five hundred dollars, secured by mortgage on the second tract so conveyed to his wife. On the 24th day of November, 1891, the appellee obtained a judgment for the amount then due him, to wit, \$1,327.70, and upon execution therefor sold said tracts, so retained by the appellant James Emerson, for the sum of \$460, there being no other property of said James upon which to levy for the collection of said judgment. At all of the times mentioned, said James was a resident householder of the State of Indiana. As conclusions of law upon

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said facts, the court found that each of the said conveyances to his wife was fraudulent and void.

The appellants moved separately for judgments in their favor upon the facts found as to each of said conveyances, which motions were overruled, and the court adjudged and decreed that said two conveyances be set aside and held for naught, and that the lands thereby conveyed, subject to the rights of Elizabeth Emerson as wife, be held subject to said judgment of the appellee.

The appellants insist that at the time of the first of said two conveyances, James Emerson retained sufficient property with which to pay his debts, and that, therefore, such conveyance could not have been decreed fraudulent.

At that time the real estate was of the value

of.....	\$3,000.00
Less a mortgage of	500.00

Or of the value of.....	\$2,500.00
Subject to the wife's one-third.....	833.33

Or of the net value of	\$1,666.67
Adding the value of personal property, \$1,000, .	
less debtor's exemption of \$600.....	400.00

And we have the total net assets subject to

debts	\$2,066.67
Value of land then conveyed	700.00

\$1,366.67

Retained from which appellee's claim of \$1,037.60, at that time, could be made.

It thus appears that at the time of the first conveyance the debtor retained sufficient property, subject to execution, to discharge his indebtedness.

We are not advised as to when the appellee's note be-

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came due, nor as to the disposition of the personal property held when said first conveyance was made, but it is quite certain that at the time the second conveyance was made the debtor did not retain sufficient property with which to pay the appellee's claim; that said conveyance was in fraud of the appellee, and, as the property which was retained was exhausted upon execution before this suit, no doubt exists that the land conveyed on April 14, 1891, was properly made subject to the appellee's judgment.

Returning to a consideration of the correctness of the court's conclusion that the first of said conveyances should be set aside, we are constrained to dissent from that conclusion, not because we feel satisfied that injustice has not resulted to the appellee by said conveyance and the subsequent disposition of the debtor's personal property, but because of the rule in this State, existing for more than forty years, that a voluntary conveyance will not be held fraudulent as against the creditors of the debtor grantor, if, at the time of the conveyance, sufficient property is retained from which the indebtedness of such grantor may be made. *Law v. Smith*, 4 Ind. 56; *Sherman v. Hogland*, 54 Ind. 578; *Spaulding v. Blythe*, 73 Ind. 93; *Rose v. Colter*, 76 Ind. 590; *Phelps v. Smith*, 116 Ind. 387; *Sell v. Bailey*, 119 Ind. 51, with numerous decisions cited in the last two cases, and the late case of *Shew v. Hews*, 126 Ind. 474.

In the case of *Rose v. Colter*, *supra*, it was held that if the debtor retained property sufficient to pay his debts, and from which the debts might be enforced upon execution, his subsequent insolvency would not permit a conveyance, otherwise fraudulent, to be set aside.

The judgment is reversed, with instructions to the circuit court to restate its conclusions of law in accordance with this opinion, and enter a decree accordingly.

Filed Oct. 10, 1894.

No. 16,894.

BOWER ET AL. v. BOWEN.

139	31
148	80

DECEDENT'S ESTATE.—Election by Widow.—When Properly Made.—

Where a widow does everything required of her by the law, and within the required time, the election is properly made.

SAME.—Election by Widow.—Need not be Made Exhibit in Action for Partition.—The election, or a copy thereof, need not be made a part of the complaint in an action by the widow for partition, where the election is but evidence of ownership and not the basis of the action.

ASSIGNMENT OF ERRORS.—Joint Assignment.—Individual Errors.—

Where several parties assign errors jointly, they are not in a position to complain of an error as to them individually.

SUPREME COURT PRACTICE.—Partition.—Exception to Commissioners' Report.—Affidavits Pro and Con not in Record.—

Alleged error of commissioners in partition is not duly presented for consideration where the affidavits in support of and against the exceptions to the report of the commissioners are not made a part of the record.

SAME.—Evidence.—Offer to Prove, etc.—When no Question Presented.—

Partition.—Where it is alleged that the court erred in refusing a trial on exceptions to the report of commissioners in partition, except by affidavits, the appellants are not in a situation to complain of the alleged error, where it is not shown in the record (1) that they in any way offered to support their exceptions by proof other than affidavits, (2) who the witnesses are that they offered in support of their exceptions, nor what they would testify to, and whether they were competent or not.

ESTOPPEL.—Will.—Election by Widow.—Partition.—

It is no ground of objection in an action for partition by the widow, who has chosen to take under the law, that she was present when the will was executed, and made no objection to it.

SAME.—Will.—Election by Widow.—

A widow who has expressed herself as satisfied with the provisions of her deceased husband's will is not estopped to take under the law on discovering what her legal rights are, if she acts in the time allowed by statute.

PARTITION.—Amendment of Pleading.—Commissioners' Report.—

A complaint in partition may be amended so as to conform to the report of the commissioners.

From the Clark Circuit Court.

J. K. Marsh and *W. H. Watson*, for appellants.

G. H. Voight and *E. B. Stotsenburg*, for appellee.

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DAILEY, J.—This action was commenced, in the Clark Circuit Court, for the partition of certain real estate in said county, described in the schedule annexed to the complaint and properly referred to.

From the first paragraph of the complaint, and the evidence introduced thereunder, it appears that Hiram Bowen died testate on the 2d day of November, 1889, the owner, in fee, of the lands so set forth; that the testator was the appellee's husband, and the appellants are his and the appellee's children and grandchildren; that within one year after the death of the deviser, being on the 1st day of March, 1890, the appellee elected to take one-third of the lands of the decedent, by filing her written election in the manner prescribed by law in force at the time.

This paragraph of the complaint alleges that she is the owner in fee of the undivided one-third part thereof as tenant in common with the defendants, and sets out the names and interests of her cotenants. There is also a prayer for partition and that her share be set off to her in severalty.

The second, third, and fourth paragraphs of the complaint sought to have a trust declared in favor of the appellee, which she alleges was created by the purchase of land with her separate funds, by her husband, without her knowledge or consent.

Upon the trial, these paragraphs were all dismissed, the appellee abandoning the trust set out therein, and the cause was disposed of upon the first paragraph only. Partition was ordered by the court, and commissioners were duly appointed to make partition. They divided the real estate of the decedent, including in their report that described in the schedule annexed to the first paragraph of the complaint, and the land set out in the sec-

ond, third and fourth paragraphs thereof, of which the testator was the apparent owner at the time of his death. Upon the filing of such report, and on the motion of the plaintiff below, the court ordered that the pleadings and record be corrected so as to conform to the report of the commissioners, and so as to include the real estate described in the last three paragraphs of the complaint.

Exceptions were filed by the appellants, and overruled by the court. They then filed their motion for a new trial, which was overruled, and the case is here upon the alleged errors, of overruling the demurrers to the first paragraph of the complaint, of overruling the exceptions to the report of the commissioners who made such partition, and upon the overruling of the motion for a new trial.

The first ground assumed by the appellants in support of their objection to the complaint is, that the election of the widow was not made in the manner prescribed by the statutes in force at the time.

The Acts of 1885, p. 239, Burns' R. S. 1894, section 2666, contain the law controlling this class of cases. This act provides that the widow shall make her election whether she will take the land so provided, or the provision so made, or whether she will retain the right to one-third of the land of her said husband. And it is required that such election shall be in writing, signed by such widow, and acknowledged before some officer authorized to take acknowledgments of deeds, and shall be made within one year after said will has been admitted to probate in this State, and shall be recorded in the office of the clerk of the circuit court in which the will is probated and recorded by such clerk in the record of wills, reference being made from such record to the book and page in which the will is recorded, and from the

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record of the will to the book and page on which such election is recorded.

In the case under consideration, it is shown that the appellee did everything required of her by law.

It is averred in her complaint, that "After the death of said testator, and within one year thereafter, to wit: on the first day of March, 1891, the plaintiff elected to take one-third of the land of her deceased husband by written election, signed by her and acknowledged before some officer authorized to take acknowledgment of deeds, which election was filed and recorded in the office of the clerk of the Clark Circuit Court, within one year after the said will was admitted to probate."

The second objection urged to the complaint is that the election, or a copy thereof, should have been made a part of the paragraph. Such is not the case, however. It is only when the action is founded on the writing that it is required to be made an exhibit. 1 Works' Pr., etc., section 420. The present action was not founded upon the election but upon the ownership, and the election was but an evidence of it, or item of proof.

The last objection made to the sufficiency of the complaint is that it does not appear, from its averments, that the defendants, Corydon C. Bower, George Huffstetter, Peter Wilson and Davis Vaught have any interest in the subject-matter of the litigation, or why they were made parties. The learned counsel are mistaken. It alleges "that George Huffstetter is the husband of Stellatus Huffstetter; that Corydon C. Bower is the husband of Hannah Bower; that Peter Wilson is the husband of Maria Wilson, and that Davis Vaught is the husband of Mollie Vaught," all of whom were daughters of the testator. They are simply made defendants as prescribed and permitted by section 5129, R. S. 1881; Burns' R. S. 1894, section 6974, which provides that all suits relative to such lands shall be

prosecuted by or against the husband and wife jointly. Besides the appellants Corydon C. Bower, George Hufstetter, Peter Wilson, and Davis Vaught having joined in the joint assignment of errors, and not having filed any separate assignment as to the sustaining of the demurrer to the complaint, they are not in a position to complain of an error of the court as to them individually. *Quick v. Brenner*, 101 Ind. 230; *Elliott's App. Proced.*, section 318.

The next question considered by the appellants is the overruling of the exceptions to the report of the commissioners who divided the land. It appears to us that there is no question of this kind before the court, for the reason that the affidavits in support of and against the exceptions are not made a part of the record. This court could not intelligently decide whether the action of the trial court is proper or not, unless it has before it the evidence upon which the decision was based. Affidavits must be made part of the record, either by bills of exceptions or the order of the court. *Cochran v. Dodd*, 16 Ind. 476; *Horton v. Wilson*, 25 Ind. 316; *Norton v. State*, 106 Ind. 163.

The next error complained of by the appellants is the overruling of the motion for a new trial. Under this assignment they argue that "the court erred in refusing the defendants a trial of this cause, on the report of the commissioners herein, except by affidavits;" also "in refusing the defendants to have witnesses to testify orally as to the report of the commissioners." It does not seem that the appellants are in a situation to complain of any such errors as are assigned in these reasons.

First. Because it is not shown in the record that the appellants in any way offered to support their exceptions by proof other than by affidavits.

Second. It does not appear from the record who the

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witnesses are that the appellants offered in support of their exceptions, what they would testify to and whether they were competent or not. The appellants were apparently satisfied with submitting the question upon affidavits. *Kern v. Bridwell*, 119 Ind. 226; *Gipe v. Cummins*, 116 Ind. 511.

The fourth and fifth reasons for a new trial are predicated on the sixth statutory ground. The investigation of these reasons necessarily involves the weighing of the evidence. This court can not ignore the well settled rule that where competent evidence appears in the record which, if true, tends to sustain the finding on every material point, unless it is of such a character as that to believe it would involve an absurd or unreasonable conclusion, no matter how much the evidence is contradicted, it will support the finding nevertheless. *Isler v. Bland*, 117 Ind. 457; *Continental Life Ins. Co. v. Yung*, 113 Ind. 159; *Cowger v. Land*, 112 Ind. 263.

In the case at bar, the evidence, in brief, shows that at the time the decedent executed his will, the appellee, then past eighty years of age, was present, and made no objection to it. Suppose she did sit quietly by and hear the instrument read, she had no right to object. The decedent had the right to dispose of his property in any way he thought best, and of this she could not complain while he was living. There is no merit in this objection.

It appears, from the evidence, that after the death of the testator, she, for a time, dwelt in ignorance as to her legal rights, and was not advised by those to whom she would be expected to look for counsel. Some fault is found with the appellee because she remained in possession of the dwelling house and surrounding land. The law authorized her to do this. The widow's quarantine

is allowed by section 2492, R. S. 1881; Burns' R. S. 1894, section 2653.

Complaint is also made of the appellee's attempt to rent part of the real estate, but it is the law that one tenant in common has as much right to rent or occupy the joint estate as another.

Counsel criticise the delay of the widow in making the election. The evidence shows that she exercised this privilege within three months after the testator's death, when she was entitled, for the purpose, to at least 364 days. The executor gave her about \$500 in property, but she had a right to it under the law. He says he sold the personal property. The law required him to do this without regard to her election. She expressed herself satisfied with the provisions of the will, but says nobody explained to her what her rights were, and when she discovered them, she at once elected to take what the law gave her. No one was injured by what she said or did, and the acts complained of do not constitute an estoppel. We are of opinion that the court did not transcend its authority in permitting the appellee to amend her complaint so as to conform with the report of the commissioners.

Section 396, R. S. 1881; Burns' R. S. 1894, section 399, permits the court, in its discretion, for the furtherance of justice, to direct any mistake in the description to be corrected; any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense.

Upon this subject, this court, in *Randles v. Randles*, 63 Ind. 93 (104), said: "In our opinion, the court had the power, and, perhaps, should have exercised it in this case, to direct the parties to so amend their pleadings, as that the same should contain full, true and correct

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descriptions of the several tracts of land of which the said Peter Randles was the owner, in fee-simple, at the time of his death, and of which partition is sought for in this action. As the pleadings of the parties might have been thus amended in the court below, they will be taken and deemed by this court to have been thus amended."

There is no error in the record for which the judgment below ought to be reversed. The judgment is therefore affirmed, at appellants' cost.

Filed Oct. 9, 1894.

No. 16,917.

KELLER v. KELLER.

JUDGMENT.—*Review of.*—*Divorce Proceeding.*—*Attachment.*—*Alimony.*—

An action will not lie to review a judgment in attachment and for alimony in a divorce proceeding, the judgment in attachment being merely in aid of the suit for divorce and alimony, and not an independent proceeding.

From the Owen Circuit Court.

I. H. Fowler and *W. A. Pickens*, for appellant.

D. E. Beem and *W. Hickam*, for appellee.

DAILEY, J.—On the 12th day of January, 1892, the appellant filed a complaint in the Owen Circuit Court to review a judgment in attachment in a divorce proceeding, and alleged therein that on the 5th day of May, 1891, the appellee, Isabel Keller, brought an action against him for divorce and alimony, and sued out a writ of attachment against his property, charging him with being a nonresident of the State of Indiana, and on the 13th day of November, 1891, recovered a judgment in

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said action for divorce, and for \$4,500 alimony, and also sustaining her attachment in said suit.

The complaint disputes the jurisdiction of the court of his person, also the subject-matter of the action, and of the property attached as the property of the defendant therein, specifically setting out the grounds on which he relies to defeat the proceeding.

On the 5th day of April, 1892, the appellee moved the court to strike from the docket, and reject this cause, for the reason that an action to review will not lie against a judgment in a proceeding for divorce and alimony. The court sustained the motion, rejected the complaint, and dismissed said cause. To this ruling the appellant at the time excepted, and prosecutes this appeal. Two errors are assigned, but as the second only is referred to by the appellant's learned counsel in their brief, the other is waived. The remaining specification is, that "the court erred in sustaining appellant's motion to strike said cause from the docket." In the discussion of the question presented by this assignment of error, the appellant's counsel seem to insist that the motion to strike from the docket was intended to take the place of a demurrer to test the sufficiency of the complaint, and that the complaint should have been considered on its merits. We think the sufficiency of the complaint is not raised by any assignment of error here. No doubt, the view upon which the court below sustained the motion to reject the complaint is expressed in section 615, R. S. 1881, Burns' R. S. 1894, section 627, which provides, that "no complaint shall be filed for a review of a judgment for a divorce." Appellee insists that under this section, it matters not whether the proceedings for a divorce contain errors of law which might be proper ground for a review of a judgment in any other class of cases; that after the court has reached its judgment

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the defendant is positively denied the right to file a complaint to review it, and the court may strike it from the files even of its own motion. This is upon the theory that the court will not sit to hear complaints and trials upon imaginary causes of action, which are positively forbidden to be placed on its files.

It seems to us that there is much force in the appellee's contention. This court in construing section 615, *supra*, has held that decrees and proceedings in divorce cases can not be reviewed. *Willman v. Willman*, 57 Ind. 500; *Earle v. Earle*, 91 Ind. 27. The general policy of our law is against disturbing judgments in divorce actions, except in cases of fraud upon the jurisdiction of the court, and no fraud is alleged in the case at bar. *Sullivan v. Learned*, 49 Ind. 252; *Earle v. Earle*, *supra*; *Powell v. Powell*, 104 Ind. 18; *McJunkin v. McJunkin*, 3 Ind. 30; *McQuigg v. McQuigg*, 13 Ind. 294; *Mason v. Mason*, 101 Ind. 25. In the consideration of this question, it will be borne in mind that an attachment is not an independent proceeding, but is merely in aid of the suit. *Excelsior, etc., Co. v. Lukens*, 38 Ind. 438; *Boorum v. Ray*, 72 Ind. 151. Counsel for the appellant argue that this case does not come within the provisions of section 615, *supra*, and in support of this contention, assert that the complaint is to review a judgment in attachment, and not to review a judgment for divorce. As we have suggested, the attachment proceedings were a mere incident auxiliary to the main action which was for divorce, and can not be considered separately therefrom, so as to evade the provisions of the statute. Section 1030, R. S. 1881, section 1042, Burns' R. S. 1894, declares the only method by which a "judgment for alimony, and disposition of property, or either of them," may be in any way disturbed, and it is not pretended that this action is brought under that section. By its terms parties

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against whom a judgment of divorce has been or shall be rendered, without other notice than publication in a newspaper, may have the same opened at any time, so far as it relates to the care, support and custody of the children. Parties against whom a judgment of divorce shall be hereafter rendered, without other notice than publication in a newspaper, may, at any time within two years after the rendition of such judgment, have the same opened up, and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony, and the disposition of property. Before any judgment shall be opened, as above, for any cause, the applicant shall file a statement of the causes relied upon, and give such notice thereof as the court in term time, or the judge thereof in vacation, shall require. And when the causes specified by such applicant relate to the granting of the divorce, alimony, and disposition of property, or either of them, the applicant shall file an affidavit stating that, during the pendency of the action, he or she received no actual notice thereof, in time to appear in court at the time of the trial of such action, and object to said judgment, and shall also pay such costs as the court may direct. Any property which may have been sold under any such judgment so sought to be opened, and which shall have passed into the hands of a purchaser or purchasers in good faith, shall not be affected by any proceeding consequent upon the opening of such judgment.

This section, it is clear, does not, in any case, contemplate a review of a judgment for any cause. Under it a judgment defendant must come into court, and set forth some meritorious defense to the action, and show by affidavit that he had no knowledge of the suit in time to get into court and make his defense. But appellant claims no rights under this section, the only one that

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could afford him any relief, if he had a cause of defense, which he does not pretend he had. No affidavit was filed to show that he had no knowledge of the pendency of the action in time to defend. On the contrary, the record shows that at the first term of court after service was had upon him by publication, and by having a marked copy of the service sent to his address, he entered his special appearance and moved to quash the service, which motion was sustained. The cause was then continued, and service had by publication. Thus, from the very beginning of this action, the appellant, not only had knowledge of its pendency, but had his counsel employed in the court where it was pending to take advantage of any errors that might occur in the proceedings, and debarred himself from the benefits of this section of the statute.

In order to sustain their position here, that the court had no right to dismiss or strike the cause from the docket, appellant's counsel rely upon section 333, R. S. 1881, which enumerates the conditions under which a cause of action may be dismissed without prejudice to the plaintiff. But, in our opinion, this section lends them no support. It contemplates the existence of a cause of action, which the plaintiff had a right to have determined on its merits, the improper dismissal of which might in some way prejudice the plaintiff. But that is not this case, for the reason already stated, and the court possessed the inherent power to dispose of it in this summary manner, even upon its own motion.

In the divorce proceeding the appellant suffered a default, and permitted the appellee to prevail without a contest. There was a decree in her favor, not only severing the marriage relation, but the court found that she was entitled to \$4,500 alimony, and sustained the attachment without objection. He has no defense to offer to

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the justice of the judgment he assails, and does not pretend that if a new trial were granted, he would have any plea to interpose. He desires the judgment for divorce to stand, but attacks the attachment proceeding as void for want of jurisdiction of his person, so as to forever bar her of any claim to support. We are persuaded that a court of conscience should not lend its aid to the consummation of such a purpose.

We think the court below did not err in dismissing the bill to review the judgment in alimony and the attachment.

The judgment is, therefore, affirmed.

Filed Oct. 10, 1894.

No. 17,295.

THE STATE OF INDIANA v. WILLIAMS.

CRIMINAL LAW.—*Uttering Forged Instrument.*—*Indictment.*—*Guilt*
Known.—*“Knowingly.”*—In an indictment for forgery the phrase,
“did * * knowingly utter, publish and pass * * as true and genu-
ine, a certain false, forged and counterfeit promissory note,” etc.,
sufficiently avers the guilty knowledge that the instrument was
forged.

From the Huntington Circuit Court.

A. G. Smith, Attorney-General, S. E. Cook, Prosec-
uting Attorney, and H. C. Underwood, for State.

HOWARD, J.—The appellee was found guilty of utter-
ing a forged and counterfeit promissory note, with in-
tent to cheat and defraud, as charged in the following
count of indictment, to wit:

“And the grand jury, as aforesaid, for a second count,
on their oaths, further charge and present that one

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Philip T. Williams, late of said county, on the — day of January, 1892, at said county and State aforesaid, did then and there unlawfully, falsely, fraudulently, and knowingly, utter, publish and pass to one John G. Price, the agent of Bertha Delorme, and thereby to said Bertha Delorme, as true and genuine, a certain false, forged and counterfeit promissory note purporting to have been made and executed by said Philip T. Williams, Daniel G. McClarnon and Levi Arnold, for the payment of money to said Bertha Delorme, which false, forged and counterfeit promissory note is of the following tenor, to wit (setting out the forged note), with intent, etc.”

On the return of the verdict the appellee filed a motion in arrest of judgment, for the reason as stated in the motion, that “the second count in the indictment, the one on which the verdict is based and returned, is insufficient, defective, and does not charge a public offense.”

This motion was sustained and the judgment was arrested over the exception and objection of the prosecuting attorney.

Appellee has filed no brief on this appeal, but we learn from the brief of the prosecuting attorney that in the court below counsel for appellee contended that the second count of indictment, on which the conviction was had, “did not allege that the defendant knew the promissory note uttered was false and forged, and on this ground the court arrested judgment.”

The second count of the indictment was based upon the concluding clause of section 2354, R. S. 1894 (section 2206, R. S. 1881), relating to the uttering of forged instruments and to the knowledge, which is a necessary element of the crime, and making one guilty who “utters or publishes as true any such instrument or matter knowing the same to be false,” etc.

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The allegation in the indictment, as we have seen, is that the appellee "did then and there unlawfully, falsely, fraudulently and knowingly utter, publish and pass * * * as true and genuine a certain false, forged and counterfeit promissory note," etc.

If we understand the contention upon which the ruling of the court was based, it is that the word "knowingly" does not sufficiently express the guilty knowledge necessary to charge the crime of uttering a forged instrument; that it is not enough to allege that the appellee knowingly uttered the forged note, but that it is necessary to allege that he uttered and published a note which he knew to be forged.

In section 1806, R. S. 1894 (section 1737, R. S. 1881), it is declared that "words used in the statute to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used." See *State v. Chandler*, 96 Ind. 591; *Trout v. State*, 111 Ind. 499.

In 1 Bish. Crim. Proc., section 504, it is said that "the word 'knowingly,' or 'well knowing,' will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated."

In Bouvier's Law Dictionary the same statement is made.

In Black's Law Dictionary it is said that the use of the word "knowingly," in an indictment, is equivalent to an averment that the defendant knew what he was about to do, and with such knowledge proceeded to do the act charged.

In 1 Greenleaf Ev., section 53, the phrase "knowingly uttering a forged document" is used to express the guilty knowledge of the defendant.

In Gillett's Crim. Law, section 449, and in Moore's

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and Elliott's Ind. Crim. Law, section 1236, the same expression is used in the forms of indictment given for uttering counterfeit instruments.

The word "knowingly" is used in a like sense in the cases of *State v. Atkins*, 5 Blackf. 458, and *McGinnis v. State*, 24 Ind. 500.

In 12 Am. and Eng. Encyc. Law, 522, it is said that "knowingly, in an indictment, is a sufficient averment of knowledge." For a very full discussion of the question, see notes on the same and following pages of the encyclopedia.

The court, in holding the indictment insufficient on motion in arrest, seems to have been governed by an inadvertent ruling in the case of *Powers v. State*, 87 Ind. 97.

In that case there was an affidavit and information in four counts, two charging forgery and two charging the uttering of the forged instrument. The defendant was found guilty as charged in the affidavit and information, but not under any particular count. All the counts were attacked as insufficient on the appeal to this court. The court found the counts for forgery to be good, and that they alone were sufficient to support the verdict. This was all that was needed to affirm the judgment. The court, however, proceeded to examine the remaining counts, being those for uttering the forged instrument, and held them bad, while affirming the judgment on the first two counts.

In the third and fourth counts it was charged, in substance, "that the appellant unlawfully, feloniously, fraudulently, falsely and knowingly uttered, published and passed * * * as true and genuine, the false, forged and counterfeit order, etc."

It was contended that by this allegation it was not charged that the appellant uttered, published and passed such order, "knowing the same to be false, forged and

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counterfeit," and this contention the court seems to have sustained.

There is some obscurity in the language used by the court and in the relation of that language to the wording of the two counts held defective. We are not satisfied, from an examination of the opinion, that the court intended to hold in that case that "knowingly uttered the counterfeit order," would not convey the same meaning as "uttered the order knowing it to be counterfeit." The counts are not set out in full in the opinion.

However that may be, we are satisfied, both from the authorities which we have cited and from the common and usual meaning given in the English language to the words "knowingly" and "well knowing," that either expression is equivalent to an allegation that appellee "knew the facts subsequently stated"; that he "knew what he was about to do, and, with such knowledge, proceeded to do the act charged."

To "knowingly utter a forged instrument" is, in truth, the usual and ordinary form of expression, and fully avers the guilty knowledge that the instrument was forged.

The judgment is reversed, at the costs of the appellee.

Filed Oct. 11, 1894.

 Gregory v. Smith et al.

No. 17,313.

GREGORY v. SMITH ET AL.

SUPREME COURT.—*Appeal by One of Several Joint Judgment Defendants. Necessary Parties Appellants.—Dismissal.*—Under section 635, R. S. 1881 (section 647, R. S. 1894), all joint judgment defendants, in order that they be bound by the result, must be joined in an appeal taken by one of the several judgment defendants as co-appellants; otherwise, upon motion of the judgment plaintiff, the appellee, the appeal will be dismissed.

From the Boone Circuit Court.

P. H. Dutch, for appellant.

C. L. Holstein and *C. E. Barrett*, for appellees.

MCCABE, J.—The appellee, Harry C. Smith, was the sole plaintiff in the court below, and his coappellees, Samuel Small, John J. Carriger, Sarah F. Carriger, Susan A. Burke, Alpheus Burke, and the appellant, Thomas Gregory, were the defendants below.

The complaint sought to foreclose a mortgage on a lot in Thorntown, Boone county, Indiana, executed to secure a promissory note for \$225 and 5 per cent. attorney's fees, both of which had been executed by said Small to said John J. Carriger, which had been indorsed by Carriger, said Smith, plaintiff, being a remote indorsee. Also, a personal judgment over was sought against Small and John J. Carriger.

The other defendants below were charged with having some interest in the mortgaged real estate, which was junior and subject to the mortgage. Issues were formed upon the complaint and the cross-complaints of John J. Carriger, that of Sarah F. Carriger, that of Susan A. Burke and Alpheus Burke, and the cross-complaint of appellant, Thomas Gregory.

The trial resulted in a finding and judgment against

139	48
139	572

139	48
140	475
141	139
142	110
142	146
142	299
142	507
142	658
143	671
139	48
144	229
144	367
145	331
145	347
147	691

139	48
148	554
151	246
153	486

139	48
153	314

139	48
154	394

139	48
157	493

139	48
160	447

139	48
168	656

139	48
171	461

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Samuel Small and John J. Carriger for principal, interest and attorney's fees, amounting to \$327, and a decree foreclosing the mortgage against all the defendants.

The appellant, Thomas Gregory, being one of the defendants below, appeals and assigns error, making himself the only appellant, and he makes Smith plaintiff below and all the other defendants below, appellees to his assignment of error.

The appellees, in the aforementioned assignment of errors, Susan A. Burke and Alpheus Burke, have made a separate assignment of errors, in which they are named alone as appellants, and the plaintiff below, Smith, and all the other defendants below are named as appellees, including Thomas Gregory.

Two notices of appeal have been issued by the clerk of this court at the instance of the appealing parties, one to Susan A. Burke and Alpheus Burke, notifying them that Thomas Gregory, Susan A. Burke *et al.* had filed in said clerk's office the transcript, etc., and requiring them to appear in this court, etc. The other is a notice to Smith, Small, John J. and Sarah F. Carriger and Thomas Gregory, of the filing of the transcript by Thomas Gregory, Susan A. Burke *et al.*, and requiring them to appear in this court and defend the appeal as in the case of the other notice. It thus appears that Gregory and the Burkes have been made appellants and appellees both, as far as their counsel is able to make them so, in the same case.

The appellee Smith has moved to dismiss the appeal, for the reason that all the coparties have not been properly brought before this court: 1. Because the proper notice to coparties has not been served. 2. Because the proper parties have not been made in the assignment of errors.

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Section 647, R. S. 1894 (R. S. 1881, section 635), provides that "A part of several coparties may appeal; but in such case, they must serve notice of the appeal upon all the other coparties, and file the proof thereof with the clerk of the Supreme Court. Unless they appear and decline to join, they shall be regarded as having joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be struck out, on motion; and they shall not take an appeal afterward, nor shall they derive any benefit from the appeal, unless from the necessity of the case."

It has been held that "coparties" means coparties to the judgment and not coparties plaintiff or defendant, either in the complaint or cross-complaint. *Hadley v. Hill*, 73 Ind. 442.

It is essential that all persons whose interests may be affected by the judgment, on appeal, should be made parties to the appeal in some appropriate mode. Only one appeal can be prosecuted under the provisions of the section just quoted, from a joint judgment by those who are parties to it, and yet all must be before the court to which the case is carried. Elliott's App. Proced., section 138.

No doubt the policy and object of the statute are to give all judgment defendants in a joint judgment a full and fair opportunity to be heard on appeal, and at the same time prevent a multiplicity of appeals. The statute treats such a judgment as a unity, no matter how many parties may be affected by it. The statute requiring notice to be served on all other coparties when a part of them appeal, fairly implies that the parties thus to be notified must be made parties to the appeal by name.

The question arises, then, are they to be made parties as appellants or as appellees?

The language, "unless they appear and decline to join,

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they shall be regarded as having joined, and shall be liable for their due proportion of the costs," clearly implies that they are to be regarded, in the event specified, as having joined in the appeal as appellants. We say as appellants, because it would certainly be an anomaly for an appellee to appeal or join in an appeal. If such a thing can be done, then it is possible for the same party to be both plaintiff and defendant, to be both appellant and appellee in the same appeal, as the counsel who is managing this appeal is attempting to accomplish. We can not say he is appellant's counsel, because he appears for some parties who are appellees as well as appellants. The language, "if they decline to join, their names may be struck out on motion," clearly implies that such coparties names are to appear in the assignment of errors as appellants.

If their names are not to be in the assignment of errors as coappellants along with the appealing coparty, then there would be no necessity for striking out their names on their refusal to join. The language, "and they shall not take an appeal afterwards," that is after their names are stricken out, on their refusal to join, plainly implies that they have been made coappellants with the appealing coparty, and afforded an ample opportunity of bringing forward any complaint against the judgment below they may have and have declined to so complain, and for that reason such proceeding, it is provided, bars them from ever afterwards taking an appeal. If they have not been afforded that opportunity, then the appeal does not bar them from afterwards appealing. If the appeal is taken in such a manner as not thus to bar all the coparties to the joint judgment; that is, the joint judgment defendants, then this court can not entertain the appeal. This is so because the statute makes the judgment appealed from a unity as before observed, and

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permits but one assault to be made upon it by way of Appeal. Elliott's App. Proced., section 138, and cases there cited.

It has also been held that this court can not disturb a joint judgment, unless all the coparties affected by it are properly brought before this court. *Garside, Exx., v. Wolf*, 135 Ind. 42.

It is true that all the coparties to the joint judgment below have been made parties to this appeal; some of them as both appellants and appellees, and the rest of them as appellees only. They have all been served with the ordinary process of this court for bringing in appellees. Waiving the question as to the kind of notice, we are led to inquire what such appellees could have done had they appeared in this court and asked to join in the appeal? They were not made appellants, and therefore could not control or amend the assignment of errors so as to become joint appellants any more than a defendant could amend or control the complaint. The only good the notice to them of the appeal could do would be for them to make an effort to be allowed to join therein. Because we have seen that it is only a coappellant who is regarded by the statute as joining in the appeal by failure to appear and declining to join. An appellee is not regarded as joining in an appeal by his failure to appear and declining to join. This is so for the same three reasons why this court would refuse to allow an appellee to join in an appeal, namely: 1, that no court can enable a party to both assail and defend a judgment at the same time, and, 2, a party can not be both plaintiff and defendant in the same cause; and, 3, the party taking the appeal has the exclusive right to determine whom he will associate with himself as a coappellant. This court can only visit upon him the consequences of his failure to make the proper parties appellants when proper and sea-

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sonable objection is made to such failure. Therefore, making a part of the coparties against whom judgment below was rendered appellees on this appeal has clothed them with no more rights, and created no more liabilities against them than if they had not been made parties at all. If they had not been made parties no notice of appeal could have been served upon them, and without such notice the appeal would be dismissed. *Herzogg v. Chambers*, 61 Ind. 333; *People's Savings Bank, etc., v. Finney*, 63 Ind. 460; *Cranmore v. Bodine*, 65 Ind. 25; *Hunter v. Chrisman*, 70 Ind. 439; *Couch v. Thomas*, 71 Ind. 286; *Hunderlock v. Dundee, etc., Co.*, 88 Ind. 139.

The reason of this rule is that this court can not disturb the judgment as to all or a part of the joint judgment defendants unless they are all before the court so as to make the adjudication binding upon all of them. It was within the power, and was the duty of those of the joint judgment defendants who desired to appeal, to make all the joint judgment defendants coappellants in their assignment of errors, and serve notice of the appeal on them, file it and the proof of such service with the clerk. Then, no matter whether they declined to join or not, the appeal so presented and determined would have been a complete bar to any other appeal by any other of such joint judgment defendants. But the present appeal can not bar that part of the joint judgment defendants who are not made appellants but are made appellees. This is so because those of the joint judgment defendants who have not been made appellants, though made appellees, have neither appealed from the joint judgment nor had an opportunity of joining in an appeal therefrom. And as there can be but one appeal from a joint judgment, the appeal is not here in such a manner as to authorize this court to hear it until all the joint judgment defendants have been brought before the court

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in such a way as to make the adjudication binding upon all of them.

The appellee Smith, who recovered the joint judgment below, has a right to insist that this appeal shall not be heard until all the joint judgment defendants are so brought before this court as to bind them by the result. Hence he moves to dismiss the appeal which is his only remedy.

It is true that a joint assignment of errors must be good as to all that join in it. That is, the ruling decision or decisions thus jointly assigned must be injurious to all that join in the assignment thereof as error, or the assignment will be good as to none, though such ruling or decision was reversible error as to some of the parties so joining in such assignment. Elliott's App. Proced., sections 314, 318, 401, and authorities there cited.

The rule, however, that requires all joint judgment defendants below to be made co-appellants in this court, does not prevent either of them from separately assigning any one or more rulings as error. The separate assignment of error by either or each of them does not necessitate a change of the parties to the appeal as counsel seems to suppose. All the appellants remain the same, and all the appellees remain the same.

The parties seeking to prosecute this appeal, being only a part of the coparties to the joint judgment below, having failed to bring before this court all the joint judgment defendants below by making them coappellants so as to bind them by the result, they have failed to comply with the statute. The motion of the appellee Smith to dismiss the appeal must be sustained.

The appeal is therefore dismissed

Filed Oct. 18, 1894.

Bowles v. Trapp et al.

No. 16,983.

BOWLES v. TRAPP ET AL.

MARRIED WOMAN.—*Contract of Suretyship.*—*Not Bound by Form of.*—*Facts Control.*—A married woman is not bound by the mere form of the contract into which she enters, but the facts must control in determining the question whether the wife or her property is surety for another.

SAME.—*Promissory Note.*—*Surety for Her Husband.*—*Sole Maker of Note.*—*Defense.*—Where a person loaned money on the individual note of the wife, retaining part thereof in payment of the husband's debt, and paying the remainder to the husband, knowing it was loaned to be applied and appropriated by him to his sole use and benefit, and knowing that the words in the note: "For my sole use and benefit only," as well as the form of the contract, did not express the transaction, such facts constitute a complete defense to an action on the note, against the wife, by the payee.

From the Dearborn Circuit Court.

N. S. Givan, for appellant.

G. B. Goodhart and J. K. Thompson, for appellees.

DAILEY, J.—The appellant brought his action in the Dearborn Circuit Court, to recover on a note executed by the appellee Anna Trapp, and to foreclose a mortgage given by the appellees to secure the payment of said note. The appellee, Anna Trapp, alone answered the complaint in three paragraphs, the first being a plea of *non est factum*; the second a plea of coverture, and that she signed the note sued on as surety for her coappellee, Charles P. Trapp, and not otherwise, and the third a general denial. A separate demurrer addressed to the first and second paragraphs of her answer was sustained as to the first, and overruled as to the second. By leave of court, Mrs. Trapp amended the first paragraph thereof. To the judgment of the court in overruling the demurrer to the second paragraph, the appellant at the time excepted.

189	55
180	529
180	532
136	55
182	630

There was a reply to this answer of the appellee Anna Trapp, in two paragraphs, the first a general denial, and the second alleged that the money received on account of said loan by Charles P. Trapp was obtained by him as the agent of the defendant Anna Trapp, for her use and benefit, and by her authority and direction. The case was submitted to the court for trial, and after hearing the evidence, it found for the appellees. The appellant then filed his motion for a new trial, which was overruled by the court, and he excepted. Thereupon the court rendered judgment for the appellees, and from it this appeal is taken. The appellant assigns two errors:

1. The court erred in overruling the demurrer to the second paragraph of the separate answer of Anna Trapp.
2. The court erred in overruling the motion for a new trial.

The decisions of this court affirm the doctrine that a married woman is not bound by the mere form of the contract into which she enters, but the facts must control in determining the question whether the wife or her property is surety for another. *Vogel v. Leichner*, 102 Ind. 55; *Nixon v. Whitely, etc., Co.*, 120 Ind. 360; *State, ex rel., v. Kennett*, 114 Ind. 160; *Voreis v. Nussbaum*, 131 Ind. 267. The contention of appellant's counsel that it is hard to see how the question of suretyship can be raised where there is but one maker of the promissory note sued upon, is quite plausible. But this is no longer an open question. In *Miller, Exr., v. Shields*, 124 Ind. 166 (171), the court made the same query, and BERKSHIRE, J., said: "It is quite difficult to imagine the relation of principal and surety without a principal, and equally so to find a substantial reason on which to rest the presumption that whenever a married woman executes her individual promissory note she oc-

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cupies the position of a surety for her husband or some other person. It is true that it may be shown that the individual note of a married woman was given solely for the benefit of the husband, * but when this is claimed by her it must be made to appear affirmatively." It thus appears that the form of the contract is immaterial to the defense of the wife in this kind of a case, save as it may affect the burden of proof, and require the wife to show that in the execution of the note in suit, she occupied the position of surety for her husband or some other person. It will be observed that the demurrer to the answer of the wife admits that the appellant knew the money was loaned to be applied, and was appropriated by him to the sole use and benefit of the husband, and knew that the words: "For my sole use and benefit only," as well as the form of the supposed contract, did not express the transaction, and parted with his money to the husband, and not the wife, and applied \$399 of it in payment of the former's debt. Such facts, if established by evidence, constitute a complete defense to the action under previous decisions of this court. Appellant's learned counsel, in his brief, says the evidence clearly shows that Charles P. Trapp had been acting as his wife's agent in the transaction of business, and invokes the legal maxim: "*Qui facit per alium facit per se*. He who acts through another acts himself, the acts of the agent are the acts of the principal." Black's L. D. 982. It is also a familiar rule of law, that the capacity of a married woman to contract through an agent is now coextensive with her capacity to contract directly. 14 Am. and Eng. Ency. of Law, 620; *Wilder & Co. v. Abernethy*, 54 Ala. 644, 646.

In *Hall v. Callahan*, 66 Mo. 316 (324), it was said: "She can not make a contract through an agent which

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she could not make herself as a contract with reference to her property not separate."

In this State, so far as she is enabled to contract, she may do so in person or by an agent. *Vail v. Meyer*, 71 Ind. 159 (165).

But, as shown, she can make no contract charging her separate estate for a debt, the consideration for which moves solely to another; consequently she can not do so through an agent.

In *Fechheimer v. Peirce*, 70 Mich. 440, the rule was stated that courts will not indulge the presumption of a husband's authority to act for the wife, and a person seeking to hold her for acts done by another must show affirmatively full authority to bind her.

It was again said, in *Three Rivers, etc., Bank v. Gilchrist*, 83 Mich. 253: "The authority of a husband to act for his wife in the matter of making a loan will not be presumed from the circumstance that he has acted for her in other matters, but must be proved, like any other fact, by competent legal evidence."

In *Voreis v. Nussbaum, supra*, this court said: "The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, conclusively establishes the proposition that she was a surety and not the principal in the note, notwithstanding the form of the contract."

In this case the trial court decided simply the issue of fact joined between the plaintiff and defendants as stated in the appellee Anna Trapp's answer and in appellant's reply.

We have carefully examined the evidence in this case, and while it is in some respects conflicting in its character, yet the testimony of the appellees, if believed by the court, conclusively establishes the facts stated in the answer, and shows that the wife formally made a contract

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which she was prohibited to make. Indeed, appellant admits that he paid all the money to the husband, and made no inquiry of either appellee as to the purpose for which it was to be used. In such case, even if the evidence introduced by the appellant proved an agency, it would be entirely insufficient in law, because it is one to borrow money for the use and benefit of the husband, an agency to make a contract void as to her for want of legal power to create it.

Appellant's counsel argues that as the note reads, "for my sole use and benefit," she ought not be permitted to gainsay the representation. It seems, from the evidence in the record, that there was no concealment by the appellees, but the facts in this case were equally well known to all the parties concerned at the time the transaction took place, and, hence, that the doctrine of an estoppel *in pais* can not apply. But there is no plea of estoppel, and what the appellant urges as a bar to appellees' defense, based on the language quoted, is outside the issues, and can not be considered. 1 Works' Pr. & Pl., section 606.

There was evidence tending to support the conclusion reached by the court, and we will not disturb its judgment.

There is no error in the record.

Judgment affirmed.

Filed Oct. 17, 1894.

Stephenson *et al.* v. Boody.

No. 16,862.

STEPHENSON ET AL. v. BOODY.

SUPREME COURT PRACTICE.—*Special Findings.—Same Questions Upon Pleadings.*—Where the same questions are presented on the special findings and conclusions of law that arise on the demurrers to pleadings, the rulings upon the demurrers are immaterial.

SPECIAL FINDING.—*General Finding Disregarded.*—Where special findings are demanded and made, a general finding will be disregarded.

REAL ESTATE.—*Childless Second Wife.—Estate of.—Conveyances by Children of Prior Marriage.—Construction of Statute.—Change of Rule.*—It was held by the Supreme Court, up to the May term 1881, that by the provisions of sections 2483 and 2487, R. S. 1881, a second or subsequent wife, having no child by her husband, took only a life estate in one-third of his lands where he left living children by a former marriage. At the May term 1881, the rule was changed, it being then decided that the wife under such circumstances inherited a fee simple in the undivided one-third of the husband's lands, and that at her death his children by the former marriage became her forced heirs.

Held, that conveyances made by children of a prior marriage during the life of the childless widow while the former construction prevailed carried to the grantee the fee simple.

Held, also, that the new construction of the statute can only be applied prospectively, and that upon the death of the childless widow after such construction was declared, the children of the former marriage took nothing as against their prior grantee.

PARTITION.—*Title.*—The pleadings in a suit for partition may be so framed as to raise and settle questions of title, but where they are not, and only the matter of partition is adjudicated, the title is held as before.

DEED.—*Character of Estate Conveyed.—Estoppel.*—A deed of release, or quitclaim, or a conveyance of the right, title and interest of the grantor, even though it be with full covenants of warranty, without designating in the instrument any particular estate, operates simply to transfer the present interest of the grantor; but where a deed containing covenants of warranty bears upon its face evidence that the grantor intended to convey an estate of a particular description or quality, then, even though the covenants be technically imperfect, the grantor and those claiming through him will be bound in respect to the estate described, to the extent at least of being estopped

139	60
141	177
141	362
142	244
139	60
144	499
139	60
148	9
148	393
150	174
151	105
151	107
151	379
139	60
153	58
153	497
139	60
155	145
155	147
139	60
157	455
139	60
158	536

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to deny that the grantor was seized of such estate at the time of the conveyance.

From the Bartholomew Circuit Court.

J. F. Cox and *W. L. Cox*, for appellants.

M. D. Emig, for appellee.

MCCABE, J.—The appellants, Sarah Stephenson, Elizabeth Hummel, George W. Tull, Stoughton C. Tull, John J. Tull, William A. Tull and Chambers H. Tull, sued the appellee for partition of certain real estate described in the complaint, situate in Bartholomew county, Indiana.

A great number of rulings upon demurrers to answers were made which have been assigned for error. There was a special finding of the facts upon which conclusions of law were stated by the court in favor of the appellee, upon which he had judgment over a motion for a new trial. The errors assigned also call in question the conclusions of law, and the action of the court in overruling appellants' motion for a new trial.

It has often been held by this court, that where the same questions are presented on the special findings and conclusions of law that arise on the demurrers to pleadings, as is the case here, the rulings upon the demurrers are immaterial. For that reason we do not examine the errors assigned on the rulings on the demurrers to pleadings.

The substance of the special finding is as follows: That Richard Tull died on April 10th, 1870, seized in fee simple of certain lands situate in said county, particularly described, among which was the land sought to be parted in this suit; that he left surviving him as his heirs his widow, Nancy J. Tull, she being his second wife and childless, the plaintiffs herein, and one Richard J. Tull, Jr., his children by a former marriage; that

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on April 18th, after the death of said Richard J., Sr., the said Nancy J. Tull conveyed by warranty deed all her interest in said lands to Philip J. Hummel; that she afterwards sued said Hummel and said children in the Bartholomew Circuit Court to set aside said deed to Hummel for fraud and undue influence practiced upon her by Hummel, and for partition against said children, claiming only a life estate in the undivided one-third of said lands, and that said children were the owners as tenants in common of the whole of said lands subject only to her alleged life estate; that on August 8th, 1870, said court set aside said deed upon the ground alleged, and also entered a decree of partition in favor of said widow, and set off the land described in the complaint to said widow for and during her natural life; and these plaintiffs, as the children and heirs of said deceased, were adjudged and decreed to be the owners in fee simple of the whole of said real estate of which decedent died seized, subject only to the life estate of said widow therein; that thereafter, on May 21st, 1872, said Nancy J. Tull sold and conveyed by warranty deed to the defendant, Boody, all the right, title and interest as set off to her in said suit in said lands, being the same land described in the complaint herein; that on July 27th, 1871, the plaintiffs, John J. Tull and wife and George W. Tull and wife, sold and conveyed by warranty deed, to Wallis Wilson, all their undivided interest in and to the real estate owned by decedent at his death, including that described in the complaint herein; that on January, 1872, said Wallis Wilson sold and conveyed the shares and interest so acquired by him to defendant Boody; that on April 4th, 1872, the plaintiffs, Sarah Stephenson and husband, William A. Tull and Elizabeth Hummel and husband, sold and conveyed by warranty deed all their shares in and to the real estate of said decedent

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as his heirs, being three-eighths thereof including the lands described in the complaint herein; that on January 8th, 1872, the plaintiff, Stoughton C. Tull and wife, sold and conveyed by warranty deed his undivided one-eighth interest in said land, including that described in the complaint herein; that on December 25th, 1871, the plaintiff, Chambers H. Tull, and wife, by warranty deed, conveyed to defendant, Boody, all of his undivided interest and share as heir of said decedent in the lands of said decedent, including that described in the complaint herein; that the said defendant, Boody, and Wallis Wilson, in each of their purchases from the plaintiffs, paid the full value of a fee simple title per share less only the value of the life estate of the widow therein; that at the time of making each and all of said sales by these plaintiffs they represented and held themselves out to be the owners in fee simple and tenants in common of the whole of said real estate subject only to the life estate of said widow as fixed by the judgment of said court, and the defendant purchased the real estate in question in good faith, believing such representations to be true; that defendant, Boody, in good faith, believing that the title he had so purchased was perfect and indefeasible, had expended large sums of money in lasting and valuable improvements on said land with the knowledge and acquiescence of plaintiffs, of the value of \$2,500, and that said improvements were made during the lifetime of said widow, who died August 28th, 1888; that at the time of the death of Richard J. Tull, Sr., and at the time of said suit in partition in the Bartholomew Circuit Court, and for a long time prior thereto, the Supreme Court continuously construed the statute of descents in such cases to invest the childless second wife with a life estate only in the one-third of her deceased husband's real estate; that the defendant knew Richard J. Tull, deceased, in his

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lifetime, knew of his first and second marriages; that plaintiffs were his children by a former wife, and that there were no children by his second marriage.

1. The conclusions of law are to the effect that Nancy J. Tull, as the surviving widow of Richard J. Tull, Sr., as such widow inherited the undivided one-third of the real estate of her said deceased husband in fee simple, and being a childless second wife of said decedent, the descent of said real estate was cast by law upon the plaintiffs' as the children of said decedent by a former marriage, and on the death of said surviving widow the said plaintiffs were entitled to inherit from said widow as forced heirs under the statute of descents in such cases.

2. That the title to the real estate described in the complaint was put in issue in the partition suit between the said widow and these plaintiffs, and determined on August 8, 1870, in the Bartholomew Circuit Court.

3. That the decree and judgment rendered therein, although founded upon an erroneous construction of the statute of descents, being unappealed from is binding upon the parties thereto, and upon these plaintiffs, constituting a rule of property.

4. That by reason of all the facts set forth in the special findings herein, the plaintiffs, and each of them are estopped from setting up any title, claim or interest in and to the real estate described in the complaint herein, or from denying the fee simple title of the defendant Boody.

There is also a general finding against the plaintiffs on their complaint, and for the defendant on his answer. But such general finding must be disregarded as a general verdict must when a special one on demand has been returned. *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93.

By a long line of decisions of this court, beginning with *Martindale v. Martindale*, 10 Ind. 566, at the May term of this court for 1858, and extending up to the case of *Utterbach v. Terhune*, 75 Ind. 363, at the May term 1881, it was held that by the provisions of sections 2483 and 2487, R. S. 1881, a second or subsequent wife, having no child by her husband, took a life estate only in his lands where he left upon his death children alive by a former wife. At the May term 1881, in *Utterbach v. Terhune*, *supra*, those decisions were overruled, and it was decided that a second or subsequent wife having no child by her husband, inherited a fee simple in the undivided one-third of his land, where he died having children alive by a previous wife, and that at her death such children became her forced heirs.

This last ruling is now settled and adhered to as the correct construction of this statute. *Caywood v. Medsker*, 84 Ind. 520; *Hendrix v. McBeth*, 87 Ind. 287; *McClamrock v. Ferguson*, 88 Ind. 208; *Flenner v. Benson*, 89 Ind. 108; *Flenner v. Travellers Ins. Co.*, 89 Ind. 164; *Bryan v. Uland*, 101 Ind. 477; *Thorpe v. Hanes*, 107 Ind. 324; *Erwin v. Garner*, 108 Ind. 488; *Gwaltney v. Gwaltney*, 119 Ind. 144.

Accordingly it was held by this court in the recent case of *Hasket v. Maxey*, 134 Ind. 182, that deeds executed by the children of a previous wife, where their father at his death left a second or subsequent childless wife, such deeds being executed during the life of such widow, and while the former construction of the statute prevailed, and purporting to convey the interests of such children in that part of the real estate of their father set off to such widow, were effectual to convey the fee simple in such lands. It was said in that case, at pages 190 and 191, that: "Courts of last resort are often con-

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strained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is, and always has been, as expounded in the last decision. But to this general rule there is a well established and well understood exception. This exception is that, 'after a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'” Citing *Douglass v. County of Pike*, 101 U. S. 677; *Anderson v. Santa Anna*, 116 U. S. 356; *Ohio Life Ins. Co. v. Debolt*, 16 How. 415; *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa Co.*, 3 Wall. 294; *Olcott v. Supervisors*, 16 Wall. 578; *Taylor v. Ypsilanti*, 105 U. S. 60.

It was there further said, quoting from *Ohio Life Ins. Co. v. Debolt*, *supra*, that: “The sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature of the State, or decision of its courts, altering the construction of the law.”

All the deeds involved in the special finding in the case at bar were executed between the May term of this court for 1858 and the May term, 1881, and they all purported to convey the interest of the several children by a former wife in that part of the lands of which their father died seized set off to his widow, she being a subsequent childless wife. The law of the contract expressed in such deeds was as this court had, up to that time, expounded and declared it to be, that such second

or subsequent childless wife took nothing but a life estate in her husband's real estate, where, as here, at his death he left children by a former marriage, and that such children took by inheritance from him the fee simple to all his land subject only to the life estate of such wife in the undivided one-third thereof.

Against a change of this law by a subsequent change of construction of the statute by this court so as to have a retroactive effect, the 10th section of the constitution of the United States (1 R. S. 1894, section 10) (R. S. 1881, section 10), and the 24th section of article 1 of the State constitution protected the grantee in such deeds. *Hasket v. Maxey, supra*.

The new construction of the statute is binding and is the law when applied prospectively.

The second and third conclusions of law to the effect that the judgment in the partition suit adjudicated the titles of the parties and concluded them are erroneous.

It was held in *Hasket v. Maxey, supra*, that a judgment in partition precisely like the one here involved did not settle any question of title. It was there conceded that the pleadings might be so framed as to raise and settle the question of title in a partition suit, but that they were not so framed in that case, and they were the same there as here.

The fourth conclusion of law is broad enough to justify the judgment in favor of the appellee, notwithstanding the error in the second and third. If the judgment is right upon the facts found, an error in one of the conclusions of law will not justify a reversal of the judgment. *Slauter v. Favorite, Guar.*, 107 Ind. 291.

It was also held in *Hasket v. Maxey, supra*, that it is a general rule that a quitclaim deed does not estop the person executing it from asserting an after acquired interest in or title to the land therein described; and that

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there are exceptions to such rule, yet that the case then before the court did not fall within such exceptions. The same is true of the case at bar.

The general proposition is abundantly maintained by the adjudged cases that a deed of release, or quitclaim, as was the case here with at least one of the deeds, or a conveyance of the right, title and interest of the grantor, even though it be with full covenants of warranty without designating in the instrument any particular estate, as was the case with at least two of the deeds here involved, operates simply to transfer whatever interest the grantor had at that time. *Habig v. Dodge*, 127 Ind. 31; *Locke v. White*, 89 Ind. 492; *Bryan v. Uland*, *supra*; Rawle on Covenants (5th ed.), section 250.

Where, however, a deed containing covenants of warranty bears upon its face evidence that the grantor intended to convey an estate of a particular description or quality, then the prevailing doctrine is, even though the covenants may be technically imperfect and informal, that the grantor and those claiming through him will be bound in respect to the estate described, to the extent at least of being estopped to say that the grantor was not seized of the particular estate at the time of the conveyance. *Habig v. Dodge*, *supra*; *Nicholson v. Caress*, 45 Ind. 479; *Van Rensselaer v. Kearney*, 11 How. 297; *Hannon v. Christopher*, 34 N. J. Eq. 459.

Therefore, in so far as the fourth conclusion of law is susceptible of being construed as a conclusion that the deed without covenants and those with covenants, but purporting to convey only the right, title and interest of the grantors in the premises mentioned in the special finding, operated as a conveyance by estoppel of an after-acquired title, is erroneous. But we do not construe it as a conclusion that the plaintiffs' after-acquired title was transferred by estoppel arising out of such deeds,

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but rather that the title then subsisting in the grantors, by a long line of decisions of this court, was actually and in fact transferred by such deeds by reason of all the facts set forth in the special finding, and that, therefore, the plaintiffs, and each of them, were held estopped from setting up any title, claim, or interest in and to the real estate described in the complaint or from denying the fee simple title of the defendant Boody.

The judgment being right upon the facts found, and the controlling part of the conclusions of law being correct, there is no such error in such conclusions as will warrant a reversal of the judgment.

Under appellants' motion for a new trial two grounds therein assigned are urged for a reversal: 1. That the finding was contrary to law. The reason assigned for this contention is that the court adopted the view of the law which we have in this opinion. Counsel concede, if that view of the law can be maintained, that the appellants have no standing in court. 2. It is urged that the court erred in overruling objections of the appellants to testimony detailing all the facts and circumstances under which the deeds mentioned in the special finding were executed.

There was no available error in this ruling.

The judgment is affirmed.

Filed Oct. 10, 1894.

No. 16,925.

MCMILLAN ET AL. v. DEERING & CO.

139	70
155	155
189	70
4102	357

SALE.—Power of *in Will*.—Conveyance.—When in Fee.—Real Estate.—

Where the power of sale given to the widow by the will of her deceased husband is clear and absolute, without conditions of limitations, a conveyance in fee will be upheld, whether the widow holds the fee or a life estate.

SAME.—Power of.—Life Estate.—Conveyance in Fee.—Consideration.—

Presumption.—If she hold but a life estate, and the deed purports to convey the fee, it will be presumed that the conveyance has been made pursuant to the power without an express statement in the deed that such was the intention, without reference to the power. Such presumption, however, must arise from considerations entirely independent of the price paid, unless the consideration paid is entirely disproportionate to the value of the fee, and is proportionate to the value of the life estate, in which case it would probably be a circumstance to be considered in rebuttal of the presumption which arises independently of the values.

SAME.—Void Deed.—Unsoundness of Mind of Grantor.—Not Judicially

Declared So.—Knowledge by Grantee.—It can not be maintained that the deed, in such conveyance, was void because of the insanity of the grantor, the widow, where it does not appear that the widow had ever been adjudicated a person of unsound mind, or that the grantee knew of her alleged unsoundness of mind.

SAME.—Conveyance.—Color of Title.—Voidable Deed.—Power of Sale.

—The power expressed in the will, the execution of the deed pursuant to that power, and a subsequent purchase by one unacquainted with the mental condition of the grantor, give colorable title which is at most only voidable, and not void.

SAME.—Will.—Conditional Fee.—Power of Sale.—Quieting Title.—In

such case, where the will provided: "I give and bequeath to my beloved wife, * * all the property, moneys and effects that I may be possessed of at my death, to dispose of at her own discretion, and if she see cause to sell the real estate, I hereby authorize her to do so, * * without order of court; and after the death of my wife, * * the remaining property to be divided between my two daughters, * * to them and their heirs," the daughters, or the heirs of either or both of them, are not the unqualified owners of the fee of such land, so as to be entitled to have their title thereto quieted, and can not become such owners so long as the widow lives and may execute the power conferred by the will.

McMillan *et al.* v. Deering & Co.

From the Gibson Circuit Court.

L. C. Embree, for appellants.

W. M. Land and *J. B. Gamble*, for appellee.

HACKNEY, C. J.—The appellee holds and claims the ownership in fee, of the real estate in suit, by mesne conveyances from the widow of John Rupert, made pursuant to the provisions of the last will of said Rupert. The appellants claim and seek to quiet title to said real estate as the heirs of one of the daughters of said John Rupert, and predicate their claim upon the provisions of said will.

The will was in a single clause or item, and the part thereof requiring interpretation is as follows: "I give and bequeath to my beloved wife, Amelia Rupert, all the property, moneys and effects that I may be possessed of at my death, to dispose of at her own discretion, and if she see cause to sell the real estate, I hereby authorize her to do so, to make, execute a deed without order of court; * * * and after the death of my wife, Amelia Rupert, the remaining property to be divided between my two daughters, Elizabeth Applegate and Eliza Ann Weice, * * * to them and their heirs."

The appellants' propositions are that the widow took only an estate for life in the whole lands, with the remainder over to the two daughters, and that the power of sale conferred upon the widow was to dispose of no greater estate than that bestowed upon her by the will.

We think it manifest that, notwithstanding the inapt use of the word *bequeath*, it was the intention of the testator to devise to his widow an interest in lands. The word *property* as twice employed, its connection with the authority to sell *real estate* and the presumption from the use of the word *heirs*, with relation to such *property*, lead inevitably to the conclusion we have given. The power

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of sale given to the widow is clear and absolute, without conditions or limitations.

In such case a conveyance in fee will be upheld whether the widow holds the fee or a life estate in her own right, and if she hold but a life estate, and the deed purport to convey the fee, it will be presumed that the conveyance has been made pursuant to the power, without an express statement in the deed that such was the intention, and without express reference to the power. *Clark v. Middlesworth*, 82 Ind. 240; *Silver v. Canary*, 109 Ind. 267; *South v. South*, 91 Ind. 221; *Downie v. Buennagel*, 94 Ind. 228; *Levengood v. Hoople*, 124 Ind. 27.

The first two of these cases did not, as did the third and fourth cases, declare that the conveyances pursuant to the power expressed should be of the same quantity or quality of estate, that the testator might himself convey or that it should be in fee, and in this respect they are identical with the present case.

The case of *Dunning v. Vandusen*, 47 Ind. 423, concurs in the holding of the cases cited, that a life tenant, with power of disposition, may convey the fee, but, so far as that case holds to the doctrine that the conveyance must purport to pursue the power, it is not in line with those cases and has been departed from in numerous instances.

The case of *Eubank v. Smiley*, 130 Ind. 393, urged by the appellants, held that the will there under consideration gave the power of disposition only as to personal property and did not include real estate. Here the power is given with express reference to the real estate. The answer, under which this question arises, alleges conveyances by said widow to appellee's grantor by a deed of general warranty and for a valuable consideration.

By the statute, R. S. 1894, section 3346 (R. S. 1881,

section 2927), such conveyances are deemed to include the fee.

It is urged, also, that, under the cases above cited, it was not sufficient to allege that the conveyances were supported by a valuable consideration, and that it should have been shown that such consideration was the full value of the fee. We do not understand the cases cited to hold as contended. It is held that where a full consideration for the fee appears to have been paid, this circumstance will control the otherwise doubtful intention of the grantor in conveying, by general description, the fee, under the power of disposition, or the life estate, as possessed by the widow. But, as we hold, the presumption of an intention to convey the fee must arise from considerations entirely independent of the price paid. If, however, the consideration paid is entirely disproportionate to the value of the fee, and is proportionate to the value of the life estate, that fact is probably a circumstance to be considered in rebuttal of the presumption which arises independently of the values.

But we do not understand the cases as holding that in the first instance the grantee, under such general conveyance, must assume the burden of showing a full consideration paid for the fee, nor can it be possible that subsequent good faith purchasers are obliged to assume the same burden as to such original conveyance. A thought to the contrary could only have been suggested by the references made in *Clark v. Middlesworth, supra*, and *South v. South, supra*, to the fact that in *Dunning v. Vandusen, supra*, it appeared affirmatively, from the complaint, that the consideration was entirely disproportionate to the value of the fee, and was accepted in support of the assumption that the life estate, and not the fee, was intended to have been conveyed.

To an answer setting up the will, a sale by the widow,

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a mortgage by her grantee, a foreclosure, sale and conveyance to the appellee, the appellants replied that at the time, and for thirty years prior to the execution of said deeds, the widow was of unsound mind, and that no consideration was paid to her for the conveyances. The replies, as did the paragraph of complaint to which a demurrer was sustained, pursued the theory that the deed by the widow was absolutely void. The argument of counsel is that the deed was void for the want of power from the will to convey more than a life estate, and that it was void, conceding the power by the will, because of the unsoundness of mind of the grantor.

As to the first argument we have given our opinion, in holding that she conveyed the fee, and therefore the first paragraph of complaint was insufficient, and the court did not err in sustaining the appellee's demurrer thereto.

The second proposition, namely, that the deed was void because of the insanity of the grantor, is not tenable. It does not appear from any allegation of the replies in question that Mrs. Rupert had ever been judicially declared a person of unsound mind, or that the appellee knew of her alleged unsoundness, and it must, therefore, be presumed that she had not been so found. *Hardenbrook v. Sherwood, Guar.*, 72 Ind. 403; *Northwestern, etc., Fire Ins. Co. v. Blankenship*, 94 Ind. 535.

In view of this presumption, the deed, at most, was only voidable. *Ashmead v. Reynolds*, 127 Ind. 441; *Boyer v. Berryman*, 123 Ind. 451; *Schuff v. Ransom*, 79 Ind. 458; *Foy v. Burditt*, 81 Ind. 433; *Hardenbrook v. Sherwood, Guar., supra*; *Wray, Admr., v. Chandler, Guar.*, 64 Ind. 146; *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Musselman v. Cravens*, 47 Ind. 1; *Somers v. Pumphrey*, 24 Ind. 231; *Crouse v. Holman*, 19 Ind. 30.

In *Ashmead v. Reynolds*, *supra*, it was said: "Before a party holding such contract or deed can be subjected to litigation, he must have an opportunity to correct the evil without costs. Something should be said, or some act done, whereby the party holding such deed or contract is distinctly given to understand that the party having the right to do so intends to disaffirm. It is the act of disaffirming which destroys a voidable contract or deed, and not the proceedings which may be taken to give force and effect to the disaffirmance after it has been made. *Potter v. Smith*, 36 Ind. 231; *Long v. Williams*, 74 Ind. 115."

The power expressed in the will, the execution of the deed pursuant to that power, and a subsequent purchase by one unacquainted with the mental condition of the grantor, give colorable title which, as we have said, is, at most, only voidable, and not void. This view of the question, though urged by the appellee, is not discussed by the appellants, and we are at a loss to determine what, if any, reason they could urge for their failure to avoid the deed by disaffirmance. It is urged that one who is insane may not execute a power conferred by will. To this contention is cited *In re Alexander*, 27 N. J. Eq. 463. There it was said that the donee of the power to convey, if *non compos mentis*, could not execute the power.

However, the case was not decided upon that question, and we do not accept the case as of controlling weight here. Mrs. Rupert is yet living, and if restored to reason, could confirm title in the appellee. The appellants are not the unqualified owners of the fee, if the deed in question were void, and they can not become such as long as Mrs. Rupert lives and may execute the power conferred by the will.

It is the ordinary rule that a power may be executed

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through one who is under legal disabilities, when such person acts merely as the conduit through which title passes. The title of the appellee, the fee, is derived not from, but through, Mrs. Rupert from the testator, and it may be important to inquire by what right the appellants question the validity or propriety of the testator's action in making his widow, though *non compos mentis*, the source through which title should flow. The primary object of the will was provision for his widow, and the secondary object was provision for the appellants. But we do not decide that one who is *non compos mentis* may execute a power conferred by will and involving the exercise of discretion, whether that mental condition existed at the time the power was conferred or arose subsequently, but our suggestions upon this subject, it occurs to us, lend strength to our conclusion that until Mrs. Rupert or her guardian or other representative or some one standing in privity of estate with the testator, shall disaffirm her deed, there is no possible right of action against the appellee.

In this view of the case, if the allegations of the replies and the first paragraph of complaint were combined, they would not constitute a cause of action.

The circuit court, in our opinion, did not err in the rulings complained of, and the judgment is affirmed.

Filed Oct. 12, 1894.

The American Furniture Company v. The Town of Batesville.

No. 16,475.

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BATESVILLE.

139	77
146	584
139	77
155	883

139	77
169	126

NUISANCE.—*Towns.*—*Power to Abate Nuisance.*—*Right to Resort to Courts.*—The power conferred by statute upon incorporated towns to declare and abate nuisances does not exclude a resort to the courts for such purpose.

SAME.—*Obstruction of Way.*—*Insufficient Description.*—*Decree.*—*Modification.*—Where, in a suit by a town to abate an obstruction in a highway, the complaint and verdict are so uncertain as to the location of the obstruction that no definite order of abatement can be based thereon, a motion to modify the decree so as to eliminate the order of abatement should be sustained.

REMEDY.—*Choice of Concurring Remedies.*—*Effect of.*—Where there are concurring effectual remedies, the choice and uninterrupted prosecution of one excludes the other.

From the Ripley Circuit Court.

C. K. Bagot and A. Stockinger, for appellant.

J. H. Connelley, M. R. Connelley and J. B. Rebuck, for appellee.

HACKNEY, C. J.—The action herein was by the appellee, as an incorporated town, to declare an obstruction of one of her streets a nuisance, for the abatement of such obstruction, and for damages.

The appellant first complains of the action of the circuit court in overruling a demurrer to the first and second paragraphs of complaint. The point urged is that by section 3333, subdivision 4, R. S. 1881, towns possess the power "to declare what shall constitute a nuisance, and to prevent, abate and remove the same"; that such power permits a remedy excluding a resort to the courts for such purposes.

The argument is also made that, under the power conferred by the statute, the town could proceed to declare

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the obstruction a nuisance, and to abate it by the action of its trustees, notwithstanding a prior adverse adjudication by the courts, if resort to the courts may be had.

We can not concur in this contention. If there are concurring effectual remedies, the choice and uninterrupted prosecution of one excludes the other. *Buscher v. Knapp*, 107 Ind. 340; *Traders' Ins. Co. v. Carpenter*, 85 Ind. 350; *Klebar v. Town of Corydon*, 80 Ind. 95; *Searle v. Whipperman*, 79 Ind. 424; *Dunkle v. Elston*, 71 Ind. 585; *Ney v. Swinney*, 36 Ind. 454.

The insistence is that the summary remedy possessed by the town is exclusive of the remedy adopted, and precludes a resort to the courts.

In support of this point, counsel cite *Storms v. Stevens*, 104 Ind. 46, where it is held that a statute creating a new right and prescribing the mode of its enforcement excludes all other remedies.

The summary abatement of a nuisance was a right which existed at common law in favor of the individual sustaining special injury from such nuisance, and the statute in question but confers that right upon the municipal corporation. It is not a new right. It should be remembered, also, that it is by proceeding *in rem*, and not *in personam*, for herein lies a distinction in the proceeding here in review. The power extended to towns does not permit proceedings *in personam*, and in the nature of civil actions which affect particular persons, but, like other corporate powers, must be exercised by and through ordinances, general in their character and affecting alike all the property or all the business of all of the citizens under like conditions, occupying like situations and conducted in like manner. *City of Plymouth v. Schultheis*, 135 Ind. 339.

Therefore, it would not be possible for the appellee to adopt the remedy here adopted, a remedy which is per-

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sonal in its character, and one which invokes the equity jurisdiction of the court to restrain the person from the further maintenance of that which obstructs the way and affects the corporate rights.

It is true that the complaint asks to declare the obstruction a nuisance, and to abate it, but this remedy is sought by and through that jurisdiction which the court may exercise, in the first instance, over the alleged offender. Authors and the judges speak of the enjoining of nuisances in the same sense as of the abatement of nuisances, and, in a general way, there is no distinction. The abatement, in one instance, is accomplished through the restraining influence of the court over the defendant, and, in the other, it is by and through its officers under a decree against the defendant, where, as we have said, the proceeding is *in personam*. But, whatever distinctions may properly exist, it is certain that towns may not, in their corporate capacity, proceed by adversary methods, before their own trustees, to adjudge a particular property or structure a nuisance, and, by order against the owner, secure its abatement.

In the case of *Cheek v. City of Aurora*, 92 Ind. 107, the city had threatened to abate an obstruction of a street as a nuisance, and the owner of the obstruction instituted suit to enjoin the city from its threatened action. The city, by cross-complaint, sought to declare the obstruction a nuisance, and prayed that, as such, it be abated and the owner enjoined. Upon such cross-complaint, the city succeeded, and objection was made that the remedy afforded by the statute enabled the city to abate the nuisance, and excluded any remedy by the courts. This court held, quoting from Dillon's *Munic. Corp.*, section 659, that "where, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, it may, in its corporate

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name, institute judicial proceedings to prevent or remove obstructions thereon."

It is there further said that "the city might have resorted, in the first instance, to an independent action seeking the relief obtained in this suit; and the facts which, in such independent action, would have entitled the city to such relief, constituted proper ground of counterclaim in this action."

The statute in question gives the power to "prevent," as well as to abate, nuisances, and it could as well be contended that this power would preclude the exercise of the equitable jurisdiction of the courts to enjoin the threatened erection of a nuisance within the town (a power certainly possessed. See Wood on Nuisances, p. 889), as to insist that such jurisdiction is denied by the possession of the power to abate.

Statutes do not, as a rule, take away previous remedies at common law, unless such an intention is declared, but they are held to be cumulative remedies. See *People v. Vanderbilt*, 26 N. Y. 287.

We conclude, therefore, that the complaint is not bad for any of the reasons urged by the appellant.

The complaint, in its first paragraph, describes the obstruction as upon Main street, and, in the second, as in a highway running north and south through said town. The general verdict finds an obstruction of "the highway as complained." The decree of the court directed the abatement of the obstruction, describing it as "in the highway between the intersection of Catherine street and the Napoleon road, in the town," and ordered the removal of the obstruction "from the highway for a distance of twenty-five feet west from the east line of Main street in said town."

The court overruled the appellant's motion to modify the decree so as to eliminate the order of abatement. One

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ground of the motion was that neither the pleadings nor the verdict sufficiently described the way obstructed as to authorize the description thereof made in the decree. Accepting the general verdict as referring to Main street, by the use of the word "highway," and the decree would probably be authorized, as Main street is a way which, from its name, can be definitely known and its obstruction located. Indeed, to describe a street by name, and to charge generally its obstruction, would be sufficient in a complaint or indictment, and would, of course, be sufficient in a decree. *State v. Buxton*, 31 Ind. 67; *Elliott Roads and Streets*, p. 494.

The fact, therefore, that the decree more particularly described the location of the obstruction upon such street as between certain intersections would not defeat the decree. But it will be observed that the general verdict follows the second paragraph of complaint in designating the way obstructed as "the highway, as complained," and, in answer to special interrogatories, it was found to be a "way running in the same general direction as Main street * *, from the intersection of Main and Catherine streets to the Napoleon and Brookville road"; that it was a "public highway" and in width "twenty-five feet west from the east line of Main street."

Looking to these answers to interrogatories, as interpreting the general verdict, the obstruction found and included in the decree could not have been upon Main street, but was upon some public highway running in the same general direction as Main street and between the intersections named. The verdict, aided by the answers to interrogatories, though more definite than the allegations of the complaint, was not sufficiently definite to enable one to learn from it where the obstruction might be found. Whether the highway, at the point of

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obstruction, was within the limits of the town we have no means of knowing, and if advised that it was we do not know, from the record, that it was the only public highway so running between said intersections. The decree is as definite as the verdict so aided by the answers to interrogatories, but we can not say that it can be made certain in the location of such way. We do not inquire as to the right of the town to abate an obstruction upon a public highway not a street within its own limits. We do hold that the motion to modify the decree should have prevailed because no definite order could be based upon the complaint or verdict.

By assignment of cross-error the appellee insists that the court erred in sustaining a demurrer to the third paragraph of complaint. If attacked for the reasons argued before us, as to the first and second paragraphs, the paragraph should not have gone down, but as the demurrer was for want of sufficient facts we can not say that the court did not conclude that it was insufficient because it did not sufficiently designate the way obstructed, the allegations being as imperfect as those of the second paragraph with reference to the way. It was not, therefore, error to sustain said demurrer.

The judgment is reversed, with instructions to sustain the appellants' motion to modify the judgment.

Filed Oct. 17, 1894.

The Island Coal Company v. Streitlemier et al.

No. 16,580.

THE ISLAND COAL COMPANY v. STREITLEMIER ET AL.

REAL ESTATE.—Cross-Complaint to Quiet Title.—New Trial as of Right.

Where, in an action to reform an agreement to convey land, and for specific performance thereof, the defendant files a cross-complaint to quiet title, the latter may claim a new trial as of right under section 1064, R. S. 1881.

SAME.—Quieting Title.—Sufficiency of Complaint.—A cross-complaint by a defendant alleging ownership of land and that the plaintiff was falsely and without right asserting that he held the defendant's written contract to convey the land and was prosecuting his action to enforce specific performance of the contract, thereby casting a cloud upon the defendant's title, shows a claim of an adverse interest in the land, and is good.

SAME.—Incompleted Contract to Convey.—Delivery.—Where a contract to sell "a strip off the north end of our farm" is signed by the parties, with an understanding that it is not to be obligatory until the owner shall have an opportunity to see where the marginal boundary lines will run, and such owner refuses to deliver the writing until the boundary lines are pointed out, and then, the boundaries not being satisfactory, absolutely refuses to deliver, there is no agreement, but only a preliminary negotiation.

SAME.—Contract to Convey.—Indefinite Description.—Specific Performance.—It seems that an agreement to "sell a strip off the north end of our farm in Stafford township, Greene county, Indiana, in shape as by diagram below, the boundaries extending north and south, being agreed upon as by diagram, and the boundaries east and west are yet to be determined upon later, but enough is to be sold to the Island Coal Company, at \$40 per acre, to (extending far enough east) cover their plant switches, pond and barn, and such as is necessary for coke ovens," the accompanying diagram being indefinite, is not sufficiently certain to be specifically enforced.

From the Owen Circuit Court.

S. N. Chambers, S. O. Pickens and C. W. Moores, for appellant.

W. W. Moffett and C. E. Davis, for appellees.

HOWARD, C. J.—This was an action by the appellant against the appellees, to reform an agreement to convey

139	83
147	211

139	83
153	435

139	83
158	268

139	83
163	125

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land, and for specific performance thereof. The appellees answered by a general denial and a plea of *non est factum*, and also filed a cross-complaint, alleging that the appellee Jane was the owner of the parcel of land described in the complaint, except a small triangular piece thereof; that the appellant was asserting that it held a written contract and agreement, executed by the cross-complainants, by which they agreed to convey to the appellant company the tract of land in question, and the company was prosecuting an action to enforce specific performance of the alleged agreement, when in truth, and in fact, appellees never did consent to, authorize, execute, or make any such agreement, or any agreement, to convey said parcel of land to said company; that the claim of the company to said land was wholly groundless, and without right, and was casting a cloud on the title of said Jane to said land; and prayed that as against said alleged contract to convey, and all other claims of said company to said lands, except said triangular piece, the title of the appellee Jane be quieted.

To this cross-complaint, and to the affirmative answer there was a general denial. The issues were tried by the court, and a special finding of facts was made with conclusions of law thereon, upon which judgment was rendered for appellant.

A new trial as of right was granted, and the venue was changed from the regular judge to the special judge below.

On the second trial, on motion of appellant, the cross-complaint was stricken out, which ruling is assigned as cross-error by appellees. The court, however, refused to set aside the rulings and orders of the regular judge granting a new trial as of right, which refusal is assigned as error by appellant.

Special findings of fact were made, with conclusions

of law, in favor of the appellees upon which judgment was entered.

Whether the court erred in granting a new trial as of right must depend upon the character of the pleading called the cross-complaint. This was a pleading filed by the appellees to quiet their title to the land in question. It is well settled that under provisions of section 1076, R. S. 1894 (section 1064, R. S. 1881), a new trial may be demanded as a matter of right in suits for quieting title to, as well as in those for the recovery of the possession of, real estate. *Truitt v. Truitt*, 37 Ind. 514, and cases cited. *Bisel v. Tucker*, 121 Ind. 249.

The same general rules govern a cross-complaint that govern a complaint. *Rausch v. Trustees, etc.*, 107 Ind. 1; *Johnson v. Pontious*, 118 Ind. 270.

The cross-complaint in this case alleged that the appellees were the owners of the land, and that the claim of the company thereto was groundless and without right, and was casting a cloud on appellees' title. This would seem to be sufficient. *Johnson v. Taylor*, 106 Ind. 89.

But counsel for appellant contend that the cross-complaint does not present the issue of title, "for the reason that the facts set up therein do not show that a cloud was being cast upon the defendant's title to the parcel of land in question by the plaintiff, nor that the plaintiff was making any claim to the title to the land as against the defendant's title thereto. That is, that the contract sued on in the complaint which the suit was commenced to specifically enforce, and the pendency of the suit for that purpose did not constitute a cloud upon the title or a claim of title as against the defendant's title."

It is true that appellant did not claim title to the property, but appellant did claim a right to the title by virtue of its contract of purchase. This, it seems to us, was a claim to an interest in the land, and if this inter-

est was real it would certainly be a cloud upon appellee's title. If, on the other hand, appellant's claim or interest in the land, whatever it might be, were unfounded and unreal, it would seem that appellees had a right to ask that such fact be established, and that their title be freed from the imputation cast upon it by the unwarranted claim made. Even "a void act may create such a cloud upon an owner's title as to entitle him to relief." *Walter v. Hartwig*, 106 Ind. 123.

Yet more, if this contract were in fact void, and still the appellant had brought suit to enforce it, and thus compel appellees to part with their title, it would seem that appellees might well ask to be relieved of further danger from the threatened claim.

Section 1082, R. S. 1894 (section 1070, R. S. 1881), authorizes an action to quiet title to be brought by any one having an interest in land "against another who claims title to or interest in real property adverse to him, * * * for the purpose of determining and quieting the question of title." Certainly the claim of appellant, under the alleged contract of purchase, is a claim of some interest in the land in question. Otherwise appellant would never have brought suit to enforce the contract.

We think the cross-complaint to quiet title was a proper pleading, and that it was error to strike it out. This ruling was, however, rendered harmless by the subsequent ruling of the court. Under their cross-complaint to quiet title appellees were entitled to a new trial as of right, and the court did not err in granting it.

The material facts bearing upon the contract of sale, upon which the suit was brought, were found by the court as follows:

That on the 27th day of January, 1887, the appellee, Jane Streitlemier, was the owner of one hundred and twenty acres of land in Stockton township, Greene coun-

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ty, Indiana, which, on that day, she and her husband and coappellee leased to appellant, who entered into possession and made improvements thereon; that on October 5th, 1887, the following agreement and diagram were read and explained to and signed by appellees, bearing date of October 1st, 1887:

"LINTON, INDIANA, October 1, 1887.

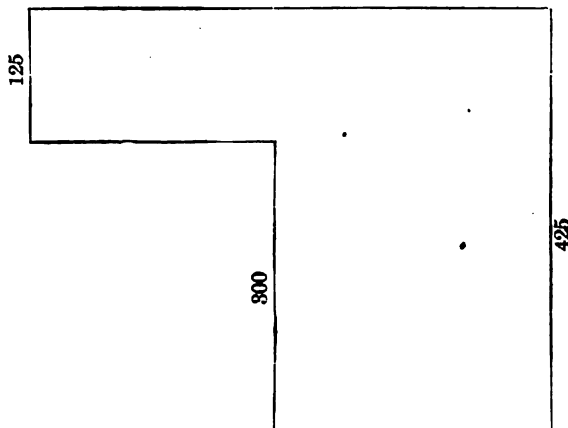
"It is hereby agreed that we will sell a strip off the north end of our farm in Stafford township, Greene county, Indiana, in shape as by diagram below, the boundaries extending north and south being agreed upon as by diagram, and the boundaries east and west are yet to be determined upon later, but enough is to be sold to the Island Coal Company, at \$40 per acre, to (extending far enough east) cover their plant switches, pond, and barn, and such as is necessary for coke ovens.

"ERNEST STREITLEMIER.

"JANE STREITLEMIER.

"ISLAND COAL COMPANY."

I. & I. S. R. R.



The figures 125, 300, 425, on the margin of said diagram were respectively intended as so many feet in

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length. The land was in Stockton township, but was, by mutual mistake of the parties, described as in Stafford township.

The finding continues: "That said agreement to sell was signed by defendants (appellees) with the understanding, at the time, that the same should not be obligatory upon said Jane and Ernest until said Jane, in whom the title to said land then was, should have an opportunity to see where such marginal boundary lines would run. Thereupon Col. Yeoman (acting for appellant) picked up said instrument, whereupon a controversy arose as to who should hold said instrument until the matter of said boundary should be assented to by said defendant Jane. It was finally agreed that Sophia Streitlemier, daughter of defendants, should hold the same. Whereupon Col. Yeoman passed it over to her; that the said boundaries could not, at that time, be definitely fixed and determined because the line of the switches connecting with the railroad had not been laid out and fixed, and said Jane did not know how far said track would run into her land, all of which was known to both parties at the time."

The tenth finding shows that on the day the agreement to sell was signed, and prior to its signing, the representatives of the coal company were at appellees' house and upon the land in dispute, and that, in the presence of appellees, measurements of the land proposed to be purchased were made, some stakes set, and the lines marked on the paper, with the figures 125, 300, 425.

The eleventh finding reads: "Said agreement to sell remained in the possession of said Sophia and defendants, and thereafter Col. Yeoman called on defendant Jane and showed her where said boundary lines would run, whereupon she refused to sell said land. Thereafter, and while defendant Jane had said instrument in

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her possession she cut her own and her husband's signature therefrom and refused to give it unto the possession of the plaintiff on demand, but permitted a copy thereof to be made therefrom, minus the signatures."

It was further found that when the switch lines had been ascertained, which was with the acquiescence of the appellees, and the amount of land necessary for pond, barn and coke ovens had been ascertained, appellant caused the lines to be run substantially as in said diagram laid out, the amount of land enclosed being about thirteen acres, as described in the complaint; that a deed was prepared describing this land, and the purchase price at forty dollars per acre tendered to appellees, but the tender was refused, as also the demand to execute the deed.

The conclusions of law upon the findings were:

"The plaintiff, the Island Coal Company, is not entitled to a reformation of said contract sued on, as prayed for in her complaint, nor is she entitled to a specific performance of said contract, nor is she entitled to a deed conveying to her the said $13\frac{5}{100}$ acre tract of land; that said contract of sale was never finally executed."

We think these conclusions were fully justified by the findings. In the first place, it is very doubtful whether the instrument sued on, aided by the diagram and by all reasonable inferences that may be deduced from the writing, is sufficient to entitle appellant to a specific performance of the contract. The agreement is to sell a strip off the north end of the farm, the north and south boundaries being agreed upon, as shown in the diagram. The east and west boundaries, however, were left undetermined, as also the quantity of land to be sold; only that it should extend "far enough east to cover their plant, switches, pond and barn, and such as is necessary

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for coke ovens,"—that is to say, as much land as the company should find necessary.

In *Colerick v. Hooper*, 3 Ind. 316, it was said by this court, that "Where a written instrument contains all the facts of a contract, except such as may legitimately be proved by parol evidence, where there is a written agreement, that instrument is sufficiently certain to be enforced."

In that case the written instrument recited: "I have this day sold my lot to Alexis Coquillard on the plat in the town of South Bend."

It assumed that the seller had one lot, as shown on the plat, and implied that he had but one; and the only question to be determined was, which lot upon the plat belonged to the seller. This could be shown by the records, or otherwise, from data given in the complaint.

In the contract before us, "the boundaries east and west are yet to be determined upon," and it would seem that the only means for making this determination was the needs of the coal company, and these needs must depend upon the extent of its proposed business and the capital which it might wish to invest. If this contract could be enforced, could not one be enforced which should read thus: "It is agreed that we will sell to the Island Coal Company so much on the north side of our farm in Stockton township, Greene county, Indiana, as the company may need for their business, at forty dollars per acre"?

In a valuable note to *Atwood v. Cobb*, 26 Am. Dec. (Mass.) 657, citing many authorities, it is said, that "Where a contract contains no certain description of the property which is the subject of it, so that it can be identified, and furnishes no means of attaining such certainty by reference to any other matter, the contract can not be

specifically enforced." See, also, *Baldwin v. Kerlin*, 46 Ind. 426.

If a surveyor should attempt to locate the land according to the contract and diagram, he would find no fixed point from which to begin. He would know that the land should be 125 feet wide at the west end and 425 at the east end; but where the 300-foot offset should be located, he could not possibly determine. Neither could he determine whether the land should be near the west or near the east side of the farm, or whether it should be taken out midway between the east and the west, or at any intermediate location. It is evident that the contract, so called, was but preliminary to a final agreement which might or might not be made between the parties. But the conclusion of the court "That said contract of sale was never finally executed," is plainly correct; even if such contract were sufficient in itself, or could be made so by extrinsic aid.

The court found expressly that at the time the contract was signed, it was done with the understanding that the contract should not be obligatory until the appellees "should have an opportunity to see where such marginal boundary lines would run." The appellees accordingly refused to deliver the instrument of writing to the appellant "until the matter of said boundary should be assented to by said defendant Jane," the owner of the land.

And it is further found that when appellant's agent finally called "and showed her where said boundary lines would run * * * she refused to sell said land"; that thereafter, and while she "had said instrument in her possession, she cut her own and her husband's name therefrom, and refused to give it unto the possession of the plaintiff on demand."

It is very clear that there never was any meeting of

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minds on this contract, that there was in fact no agreement, but only a preliminary negotiation.

The improvements made upon the land by appellant were under the provisions of its two ninety-nine year leases; under which, also, all lines were run enclosing such improvements. Appellant acquired no rights under the contract of sale; and appellees were free to complete that contract or to reject it. We think the court was fully authorized in the conclusion that the contract was never completed.

The judgment is affirmed.

Filed May 8, 1894; petition for a rehearing overruled Oct. 12, 1894.

No. 16,661.

SHARPE, ADMINISTRATRIX, v. THE COMMERCIAL TRAVELERS' MUTUAL ACCIDENT ASSOCIATION OF AMERICA.

ACCIDENT INSURANCE.—*Policy Excepting Liability for Injuries Caused Wholly or in Part from Disease.*—*Instructing Jury to Return Verdict for Party.*—Where a policy of accident insurance expressly withholds liability for "any bodily injury happening directly or indirectly in consequence of any disease;" also, for "any death or disability which may have been caused wholly or in part by bodily infirmities or disease," it was not error, in an action to collect the amount of the policy, to instruct the jury to return a verdict for defendant where the evidence shows, without doubt, by experts who conducted and witnessed a post mortem examination, that the brain and heart had been diseased for more than a year next before the death, by fatty degeneration, and that a tumor was found near the base of the brain, and that these conditions, with their attendant results, caused the fall and the injury.

SAME.—*Estoppel of Company.*—*Furnishing Blank Proofs.*—The fact that the beneficiary, at her repeated request, was furnished with blank proofs, the company all the while protesting against its liability, does not estop the company from interposing the above conditions of the policy.

139	92
143	409
139	92
166	56
139	92
166	370

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PRACTICE.—*Exception*.—*Available Error*.—To an objection not reserved by an exception, no error can be made available.

EVIDENCE.—*Irrelevancy*.—*Rejection*.—There can be no error in rejecting evidence which is irrelevant to the issues.

From the Marion Superior Court.

F. M. Finch and *J. A. Finch*, for appellant.

E. Ritter and *H. L. Ritter*, for appellee.

HACKNEY, J.—The appellant sued upon a policy issued by the appellee to one Calvin L. Sharpe, insuring him against accidental injuries and providing an indemnity of twenty-five dollars per week during disability, not exceeding twenty-six consecutive weeks, and a sum not exceeding five thousand dollars in case of death from such injuries within the period of ninety days after sustaining such injuries.

One of the expressed conditions of said insurance was as follows: "That the benefits under this certificate shall not extend to hernia, or any bodily injury of which there shall be no external or visible sign. Nor to any bodily injury happening directly or indirectly in consequence of any disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior to or subsequent to the date of this certificate, nor to any case except where the injury is the proximate and sole cause of the death or disability, or where the injury may have happened while the member was or in consequence of his having been under the influence of intoxicating drinks, or to any death or personal injury unless the claimant under this certificate shall establish, by direct and positive proof, that the death or bodily injury was caused by external, violent, and accidental means, and was not the result of design on the part of the member."

The assured, on the 29th day of November, 1889,

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while pursuing his business as a traveling salesman, sustained a heavy fall, the left side of his forehead violently striking the floor and producing an injury. If the injury was due to accident and caused the death, there is no question made of the appellee's liability under the terms of the policy. If the injury was not due to accident, it is not doubted that the terms of the policy deny a recovery. The evidence disclosed no external cause for the fall, and it appeared simply that while standing, or possibly stepping aside from the position in which he had been standing, the assured threw up his hands and fell to the floor. If this were all, there would exist the gravest doubts of a liability, since the burden rested upon the appellant to establish that the injury was due to accidental means. But the positive and uncontradicted evidence, as given by experts who conducted and witnessed a post-mortem examination, was that the brain and heart had been diseased for more than a year next before the death; that at the time of the autopsy a tumor was found near the base of the brain, and fatty degeneration of the brain had so far advanced that a great portion of the brain substance had nearly, if not entirely, been converted into fat, the convolutions of the brain were almost obliterated, and the base of the brain, especially the membranes and the bone, were in a diseased condition, the bone itself undergoing fatty change, and the fatty matter had become injected throughout the entire brain until it was very white and almost bloodless.

The heart was found to have undergone a general degeneration, the blood vessels were obstructed with fatty substance, the cavity was abnormally large, its muscular structure and fibers had been, to a great extent, destroyed and converted into the fatty matter, its walls had become weakened and the whole had become very soft;

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the pericardium was lined with fat, and its fluid was diseased.

It was shown that, without doubt, these conditions, with their attendant results, caused the fall and the injury. There was a slight conflict in the evidence as to the extent of the injury, but with that we are not concerned, nor is it essential to our conclusion that the diseases so shown to have existed at the time of the injury were or were not the causes of the death.

The fact of persons meeting Mr. Sharpe from time to time and observing nothing in his appearance to indicate ill-health raises no conflict upon the evidence of the post-mortem examination as to the existence of fatty degeneration of the heart and brain. The evidence further shows, without conflict, that one suffering with fatty degeneration of the heart and brain may go about his business with no external signs of the disease further than may be manifested by dizziness, possibly causing the victim to fall.

It is enough, upon this branch of the case, that we find no conflict as to the cause of the injury, and that its cause was not the accident insured against.

The trial court instructed the jury to return a verdict in favor of the appellee, which was accordingly done. It was not error to so instruct the jury. *Faris v. Hoberg*, 134 Ind. 269.

This case is clearly distinguishable from that class of cases, some of which are cited by the appellant, holding that life insurance may be enforced notwithstanding the existence of some bodily infirmity contributing to a death from violence.

In the policy before us, insurance is expressly withheld for "any bodily injury happening directly or indirectly in consequence of any disease," and for "any death or disability which may have been caused wholly

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or in part by bodily infirmities or disease." We know of no rule of construction under which these plain provisions of the policy may be held to include injuries and death happening "wholly or in part from bodily infirmities or disease."

But it is insisted by the appellant's learned counsel that the appellee was estopped to interpose this condition upon which the insurance was granted, for the reason, as claimed, that after the death of the member, an officer of the appellee, with knowledge of the facts disclosed by the post-mortem examination, "compelled and required the plaintiff, at great trouble and expense, to prepare and send to it repeated proofs of the death of Sharpe, * * * and thereby waived the right to insist on the presence of disease in Sharpe as a defense."

Numerous cases are cited to the effect that in those instances where fire insurance is taken upon the condition that additional insurance may not be taken without the consent of the companies giving the first insurance, the requirement of proofs, plans, etc., while possessing knowledge of the breach of the condition, is a waiver of the condition. We do not find it necessary to distinguish between the cases cited and the present, since we find that the evidence does not authorize, so fully, the premises stated by counsel from which they draw the conclusion of a waiver.

The record discloses no demand or request for proofs. On the contrary, there is no room for conflict upon the proposition that the officer mentioned not only declared orally that the payment would be contested upon the condition stated in the policy, but, in answer to the first letter written by appellant for blanks upon which to make proofs, the officer wrote: "We do not know why you want claim blanks, as Mr. Sharpe's death was not caused by an accident of any kind whatever."

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The next letter written by the officer to the appellant advised her of his information that Mr. Sharpe's injuries were not the result of accident, and did not cause his death, but that disease caused both the injuries and the death, and that while not being able to prevent her from putting in a claim, she should understand that the association was an accident association. It was also stated that proofs should contain the particulars of the post-mortem, signed by the surgeons.

In a letter of later date, inclosing, at her request, a blank for proofs, the officer repeated that a claim for death from natural causes could not be enforced, and that Mr. Sharpe had so regarded it, as seen by his failure to make a claim for weekly indemnity.

The appellant was notified, before suit and after the rejection of her claim by the directors of the appellee, that no allowance could be made to her, because of the condition so stated in the policy.

The facts disclose no element of an estoppel, even if we should concede the application of the authorities cited.

Upon the trial the appellant was called as a witness in her own behalf, but was first interrogated by counsel for appellee as to the fact that she was the administratrix of the estate, and upon her answer that she was such administratrix appellee's counsel objected to her competency as a witness, whereupon, and without an interrogatory by the appellant's counsel, the court remarked that the statute disqualified her as to any matter prior to her appointment. To this ruling, if it may be so characterized, there was no exception, but appellant's counsel, proceeded with two questions as to whether she had made proofs of death, and the amount of expense she had incurred in making such proofs. To these questions the

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appellant objected "as above stated," and the court sustained the objections and gave the appellant exceptions. To the objection not reserved by an exception no error is made available. To the inquiry as to making proofs the ruling was harmless, since the proofs made were given in evidence, and since, as we have held, the merits of her case do not depend upon the proofs of death. As to the cost of making proofs, the exclusion of her evidence worked no hardship for the reason, as we have shown, that there was no feature of an estoppel in the case, and this evidence could have served only to support the theory of an estoppel.

Another question was asked the appellant as to whether Messrs. Finch & Finch, named in a letter exhibited to her, were her attorneys at the time the letter was written, and to this inquiry the court sustained an objection. The letter was not offered in evidence, or, if it was, we have no means of identifying it, and are not enabled to discover that the inquiry had any relevancy to the questions at issue. A letter, bearing the same date said to have been borne by that referred to, was introduced in evidence and purported to have been signed by Finch & Finch. This letter was a notice to the company of the death of Calvin L. Sharpe, and a request for proof blanks. If it may be said to be the letter so exhibited to the appellant as a witness, we observe no loss to the appellant in sustaining the appellee's objection, as above stated, since it appears that no question has been made against the sufficiency of the notice of death, and the merits of the case render that question of no importance.

The further questions discussed by counsel are upon the refusal of instructions asked by the appellant, and that the verdict is contrary to the law and to the evidence. Having held that the case presented by the evidence authorized the direction by the court to the jury

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to return a verdict for the appellee, we have in effect decided these questions.

Finding no error in the record, the judgment of the superior court is affirmed.

Filed April 25, 1894; petition for a rehearing overruled Oct. 16, '94.

No. 17,303.

THE CITY OF TERRE HAUTE ET AL. v. MACK.

CITY.—Improvement Assessment.—Non-Bordering Lot.—Liability of.—Act Construed.—Under the act of March 8, 1889 (Acts 1889, p. 237; R. S. 1894, section 4288 *et seq.*), assessments for street improvements can only be made against lots bordering upon the street as designated by plat or other subdivision, and the liability of other lots back from the bordering lot and lying within one hundred and fifty feet of the street improved, arises only in the event that the bordering lot, against which the whole assessment must be levied, fails to sell for a sum sufficient to pay the assessment, and then only for the deficit, in the order fixed by the statute.

SAME.—Void Assessment.—Injunction.—Appeal.—The act of the engineer in apportioning a part of the cost of a street improvement upon a non-bordering lot, and of the city common council in assessing such amount against such lot are void, and the collection of such assessment will be enjoined, particularly as such acts are ministerial, from which no appeal has been provided by statute.

SAME.—Primary Liability of First Fifty Feet.—Must be Owned by One Person.—In so far as the first part of the proviso in section 3 of said act seems to indicate an intention to make the whole of the first fifty feet back from the front primarily and alike liable, it must be held to apply only to a case where one person owns the whole of the first fifty feet.

From the Vermillion Circuit Court.

P. N. Hiser, for appellants.

J. E. Lamb, J. T. Beasley, W. Mack, D. W. Henry and G. M. Crane, for appellee.

139	99
147	524
139	99
154	493
154	611
154	529
154	530
154	536
154	545
139	99
1169	171

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MCCABE, J.—The appellant, the city of Terre Haute, improved a portion of Fifth street in said city, from Main street south. Appellants Voorhees and Grimes were the contractors. Appellee owns real estate within fifty feet back from the street improved. It is in Blake's subdivision, a platted portion of said city consisting of a series of lots fronting on Main street, or Wabash avenue, to the north, and running back south to an alley 138 feet. The lots are numbered consecutively, beginning on the west with No. 1, lying side by side, continuing on east to No. 16 on Sixth street. Lot No. 1, owned by Hudson, lying its whole length east of, next to, and bordering on said Fifth street, was 19 feet wide; lot No. 2, owned by Froeb and Morgan, lies east of and next to said lot No. 1, and is 18.6 feet wide; and lot No. 3, owned by appellee, lies east of and next to said lot No. 2, and is also 18.6 feet wide, consequently a strip of 12.4 feet wide on the west side of lot No. 3 is within fifty feet back from said improved street, but no part of lot 3 borders, abuts or touches on Fifth street. All the lots front to the north on Wabash avenue or Main street. Lot 1, lying next to and bordering on Fifth street, is worth \$16,000, and all three lots have three story brick buildings on them.

After the work had been completed in a manner satisfactory to all, it was accepted by the city, and to enable the contractors to collect pay for the same, the city had the engineer make assessments to pay the contractors, and instead of assessing the cost of paving Fifth street along lot 1, bordering on and adjoining the same, assessed also lots 2 and a strip 12.4 feet wide on the west side of plaintiff's lot 3, making the assessment extend back for a distance of fifty feet from said improved street. And the city is about to issue her certificate to said defendants,

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the contractors, ordering them to enforce collection by the sale of plaintiff's property.

The foregoing are the facts substantially alleged in the complaint. It is further alleged that said assessment is without right and a cloud on plaintiff's title, and said defendants, contractors, are seeking to get said certificate to enforce its collection. Prayer that defendants be enjoined from issuing said certificate and collecting said illegal assessment, and for general relief. The answer of the city sets up substantially the same facts, and in addition thereto that the common council, on the 7th of November, 1893, ordered the city engineer to prepare a first and final estimate in favor of said contractors for said improvement; that on November 29th, 1893, said engineer reported an estimate in favor of said contractors for said improvement against the property owners benefited thereby, and among others the following, to wit: Mary V. Hudson, on a strip or lot of ground adjoining said Fifth street 138 feet along said street, 19 feet wide, the sum of \$297.06; Froeb and Morgan, the same length parallel with said street, 18.6 feet wide, adjoining the lot just mentioned, \$272.10, and Amanda D. Mack, a strip or lot the same length, parallel with said street, adjoining the last described strip, and 12.4 feet wide, \$161.05, said strips or lots being said lots 1, 2, and 12.4 feet off the west side of lot 3, all being within 50 feet of the east side of said Fifth street, and said improvement, and a plat thereof, is made an exhibit; that said estimate of the cost of said improvements so made and reported were made by said city engineer according to the whole length of the street so improved per running foot, and said lots being platted; and upon the proper notice being given for hearing objections to such assessments, and there being no objections the common council, on the 29th day of December, 1893, that being

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the time specified in the notice, approved and confirmed said report and assessment, and did assess against plaintiffs said lot as its proportion of the costs and benefits of said improvements said sum of \$161.05, that being the proportionate part of the cost and benefits of said improvement assessed against said lot in the ratio that said lot bore to the whole property benefited by the improvement and no more, and that plaintiff did not, after the assessment, appeal therefrom.

A demurrer to the complaint was overruled, and a demurrer to the answer was sustained, and the defendants all refusing to plead further, appellee had judgment and a decree on the demurrers enjoining the collection of said assessment against appellee's lot 3.

The suit was begun in Vigo county, and the cause was transferred on change of venue to the Vermillion Circuit Court.

These rulings are assigned as the only errors. The improvement in question was made under the act of the Legislature approved March 8, 1889. Acts 1889, p. 237, Burns' R. S. 1894, section 4288. The third section thereof, among other things, provides that "In all contracts specified in the preceding section the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or part thereof to be improved, per running foot, * * * and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any unplatted lands lying within the corporate limits of such city or incorporated town, * shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved, shall be liable to the con-

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tractor for their proportion of the cost, in the ratio of the front lines of such unplatted lands owned by them to the whole unimproved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town, and the contractor shall have a lien thereon for the value of such improvement: *Provided, however,* That where such land is subdivided or platted, the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order."

The appellee contends, first, that her lot, not fronting or abutting on the line of the improvement, is not, and she is not liable for any part of the costs of such improvement in any event under the provisions of the act from which we have just quoted. And secondly, she contends that, if she is liable at all, she is only liable after the first and second parcels have been exhausted, and have proven insufficient to pay the costs of the improvement.

Appellants contend that the statute makes the ground liable back 150 feet, though each parcel thereof may be owned by a different person, and they concede that the first parcel is primarily liable for the whole cost of the improvement if it will sell for enough to pay it. And where the 150 feet is as here owned in parcels by different owners, and the first parcel is exhausted and proves insufficient, then the next parcel must be resorted to and

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exhausted before resort can be had to the third, and so on to the rear parcel of the 150 feet. But they contend that the word "parcel," as used in the act, means 50 foot parcels, first 50 feet on the front, and secondly, the next 50 feet, and thirdly and lastly the last 50 feet of the 150 feet back; and that the first 50 foot parcel is all and alike made primarily liable, and so on with each of the other 50 foot parcels in their order. If that construction is correct, the complaint was bad, and the answer good.

The question thus confronting us is not free from difficulty. It would seem at first blush that the construction that the word "parcels," as used in the statute, means 50 foot strips regardless of the platting or subdivisions of the ground, has some equitable considerations in its favor. For instance, where the first 50 feet back is owned by more than one person, it seems equitable that they should contribute to the cost of the improvement of the street in front in some proportion, and the one owning, as here, only 19 back from the front should be subject to pay it all if his property will sell for enough, seems harsh. But if the whole act when examined together shows that to have been the legislative intent we must give that intention effect. We have nothing to do with the policy, expediency or justice of the statute. There are several reasons why the Legislature did not mean by the word "parcels," fifty foot strips or parcels, and why they meant the lots as designated on the plat, or parts of lots as designated by other subdivisions of the ground.

The provision just quoted is: Should the land lying immediately upon and adjacent to the improvement prove insufficient, then the second parcel and other parcels in their order to the rear parcel of 150 feet shall be liable. Fifty foot parcels could not have been intended, because, when the second parcel is exhausted, 100 feet

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back is exhausted, then the statute requires "other parcels in their order" to be exhausted, and other parcels "can not be less than two, which would get back at least 200 feet, and then comes "the rear parcel," required by the statute to be exhausted, if necessary, which would make 250 feet back, instead of 150 feet, as expressly limited by the statute.

Again, the fifth section provides that the city or town "shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, * * * and such estimates shall be a lien upon the several parcels of ground upon which they are assessed * * * in favor of the city or incorporated town, * * and the owner of the certificate or bonds hereinafter mentioned." It is afterwards provided that the city or town may issue bonds for the payment of the cost of such improvement, and in another section that certificates or bonds may be issued to the contractor in payment for his work, and that in each case they shall be a lien on the property liable.

When any such improvement has been completed according to the terms of the contract, the sixth section provides that "The common council of such city * * shall cause a final estimate of the total cost thereof to be made by the city * * engineer, and the common council * * shall require said city * * engineer to report to the common council * * the following facts: *

"First. The total cost of said improvement.

"Second. The average cost per running front foot of the whole length of that part of the street * improved.

"Third. The name of each property owner on that part of the street * so improved.

"Fourth. The number of front feet owned by the respective property owners on that part of said street so improved.

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"Fifth. The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running foot by the number of running front feet of the several lots or parcels of ground respectively.

"Sixth. The full description, together with the owner's name, of each lot or parcel of ground bordering on said part of said street so improved."

The seventh section, as amended by the act approved March 6, 1891, provides that after the notice and hearing therein prescribed, the common council of the city or board of trustees of such town may adopt, alter, or amend such report and the assessment therein and shall assess against the several lots or parcels of ground the several amounts which shall be apportioned for and on account of such improvement.

In addition to the frequent use of the words "lots or parcels," indicating, it would seem, an intention to use it in the sense of the lots, as designated on the plat or other subdivision of the ground, it must be borne in mind that if such is not its meaning then the act has provided no means whatever of fixing or ascertaining the amount for which a lot shall be liable on account of such improvements, where, as here, the first 50 feet back from the front consists of two or more lots, and each owned by a different person. Because, by the provisions of section 6, just quoted, the engineer's report is the only legal basis on which any assessment can be made against any land whatever. The statute points out what his report shall be. He must report, among other things, the full description, together with the owner's name of each lot or parcel of ground bordering on the improved part of said street, and the number of front feet owned by each; and, also, the amount of cost for such improve-

ment due upon each lot or parcel of ground bordering on the improved street, which amount shall be ascertained and fixed by multiplying the average cost price per running foot by the number of running front feet of the several lots or parcels. It is clear that there is no authority given the engineer to report the name of any property owner whose ground does not border or abut on the improved street; and it is beyond doubt that he is not authorized to report the amount of cost for improvement on a lot or parcel of ground that does not border or abut on the improved street. And it is equally clear that he is not authorized to ascertain and fix the amount of such cost for such improvement, due on a lot or parcel of ground not bordering on such improved street, by any method or means whatever, nor is any other person or officer authorized to do so.

If the Legislature had meant, by the word "parcels," fifty foot strips or fifty foot parcels, in the connection above quoted from section 3, thereby rendering each fifty foot strip or parcel all and alike primarily liable in their order, though owned in separate parcels by different persons, they would have provided some means or method by which the amount due on each lot or parcel back of the one bordering on the improved street within the given fifty feet could be ascertained and fixed. When the engineer ascertains and fixes the amount due on the lot or parcel of ground bordering on the improved street, he can not ascertain and fix any amount due on the next parcel back, though within fifty feet of the front, for two very good and sufficient reasons, namely:

1st. Because the statute does not authorize him to do so.

2d. Because he has already ascertained and fixed the whole amount as due upon the front lot or parcel, for

which the whole 150 feet back can in any event be made liable.

The conclusion, therefore, seems irresistible that the Legislature meant, by the word "parcels," as used in section 3, lots as designated on the plat or other subdivisions. And, in so far as the first part of the proviso in said section 3 seems to indicate an intention to make the whole of the first fifty feet back from the front primarily and alike liable, it must be held to apply only to a case where only one person owns the whole of the first fifty feet. It is only in that way that such provision can be harmonized with the subsequent part of the same section, and with section 6 above quoted.

It is a well recognized rule in the interpretation of statutes, that the whole act and all its parts must be construed together so as to give effect to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the Legislature. The statute ought to be so construed as to make it a consistent whole. Sutherland Stat. Con., sections 239-246.

It appears from the complaint and answer, that the engineer reported an estimate in favor of the contractors against the property-owners benefited thereby, to wit: Mary V. Hudson, on a strip or lot of ground on said Fifth street, 137.96 feet along said street and 19 feet wide, \$297.06; Froeb & Morgan, a strip or lot 137.96 feet long parallel with said street, 18.6 feet wide, adjoining the strip first described, \$272.10; and Amanda D. Mack, a strip or lot 137.93 feet long, parallel with said street, adjoining the last described strip, and 12.4 feet wide, said strips or lots being lots 1 and 2 and a part of lot 3; of said Blake's subdivision.

Such an estimate as this the engineer had no right to make. He was required by the statute, as we have seen, to report the amount of such cost for improvement upon

the ground bordering on the improved street, which amount he was required to ascertain and fix by multiplying the average cost price by the number of front feet, also the name of the owner of the lot so bordering on said street. The name of the owner of such lot was Mary V. Hudson, and her lot being the only one that bordered on the improved street, the amount due upon it he was required to ascertain and fix by multiplying the average cost price per running foot by the number of running front feet of her lot. And this he was required to report to the common council, and such report the amended 7th section required the common council to approve and confirm, or, in case it was incorrect, to cause it to be amended, and to make the assessment according to such report.

Therefore, if the statute had been followed by the city engineer and common council, the whole amount of cost of the improvement for which the whole 150 feet back from the line of Mrs. Hudson's lot bordering on the improved street could in any event be made liable, would have been assessed against Mrs. Hudson's lot No. 1.

Without the proviso in section 3, no person whose lot or ground does not border and abut on the improved part of the street could be made liable for any part of the cost of the improvement in any event. *Ray v. City of Jeffersonville*, 90 Ind. 567.

But the proviso makes such land liable only in the event that the lots or parcels preceding it toward the front or border have proven insufficient to pay the cost of the improvement. And the amount for which such ground is in any event made liable is not fixed by any assessment or ascertainment either by the engineer or common council, but it is fixed and ascertained by the balance remaining unpaid of the whole amount assessed on the front lot or parcel after the exhaustion of the

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parcels that precede it to the front. That can not be known and ascertained until such preceding parcels have been sold. Therefore the act of the engineer in fixing and apportioning any amount against the appellee's lot was without authority of law and void, and the act of the common council in assessing said amount against appellee's lot was void, and she was entitled to have it declared so. But it is contended that as appellee did not appeal from the assessment she could not resort to the extraordinary remedy of injunction. But it has been frequently held in such cases where there is no legal authority to make the assessment as in this case, that the same is absolutely void, and subject to relief by injunction. *Balfe v. Lammers*, 109 Ind. 347; *City of Fort Wayne v. Shoaff*, 106 Ind. 66; *Goring v. McTaggart*, 92 Ind. 200. Besides the act of the engineer in making his report and ascertaining and fixing the amount of liability on the lots or parcels, and that of the common council in making the assessment, were each ministerial and not judicial acts. From such acts no appeal lies unless given by the statute. *Board, etc., v. Davis*, 136 Ind. 503.

The statutes provides for no appeal in such cases. The complaint, therefore, stated facts sufficient to entitle appellee to some relief. She was entitled to have the assessment against her lot declared void, and to a decree enjoining the threatened enforcement thereof. At least she was entitled to a decree enjoining all attempt to collect anything against her lot until lots 1 and 2 had been exhausted by sale, and proved insufficient to pay the whole cost of the improvement. The decree was in the nature of a perpetual injunction, though it does not say so, yet it was unlimited. Had there been a motion to so modify the decree as to make it go against the collection of any of the cost of the improvement until lots 1 and 2

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had been exhausted, and proven insufficient, it would have presented a different question, and one not now before us. It follows from what we have said, that the complaint was good, and the answer was bad, and that the court did not err in overruling the demurrer to the former, and sustaining the demurrer to the latter.

Judgment affirmed.

Filed Oct. 16, 1894.

No. 16,888.

CHAMBERS v. CHAMBERS.

CONVEYANCE.—*Of Expectancy or Remainder.—Constructive Fraud.*—

Where an orphaned infant, being the actual owner of a part of a tract of land and the owner of the other part subject only to a life estate, the whole being worth three thousand dollars, is kept in ignorance of his actual legal rights by interested relatives, with whom he makes his home, and is induced, immediately after arriving at legal age, to execute a deed to the whole tract for five hundred dollars, there is such constructive fraud as entitles him to have the deed set aside.

SAME.—*Statute of Limitations.—Remainderman.—Life Tenancy.*—The statute of limitations does not begin to run against a remainderman during the life tenancy.

SAME.—*Construction of Deed.—Vested Remainder.—Postponement of Possession.*—A warranty deed conveying land to A for life, then to go in fee simple to B in the event that he lives to be twenty-one years old, vests the remainder in B but postpones the possession.

SAME.—*Sale of Remainder.—Adequacy of Price.—Life Estate not Considered.—Public Policy.*—In determining adequacy of the price paid to a remainderman, the life estate can not be taken into account, as the law, by reason of public policy, requires that the full market value be paid.

SAME.—*Relief from Fraud.—Limitation of Action.*—Upon a conveyance of land held in fee simple the statute of limitations begins to run when the deed is delivered, and relief from fraud practiced in procuring the conveyance must be sought within six years.

From the Boone Circuit Court.

139	111
139	658
139	111
143	339
139	111
155	427
139	111
159	180

139	111
e169	526
o169	533

Chambers v. Chambers.

R. W. Harrison, J. G. Adams, N. D. Carter, C. S. Wesner and O. D. Wesner, for appellant.

H. C. Wills and T. J. Terhune, for appellee.

HOWARD, J.—This was an action brought by the appellee against the appellant for the recovery of real estate.

The complaint was in two paragraphs. On the overruling of a demurrer to the first paragraph, the appellant answered the complaint by pleading the statute of limitations, and also by the general denial. To the first paragraph of the answer there was a reply in general denial.

The cause was submitted to the court, and on request of appellee the court found the facts, and also found conclusions of law, finding for the appellee as to a part of the land in dispute and for the appellant as to the remainder. Judgment was entered accordingly.

On appellant's motion the judgment was set aside and a new trial awarded under the statute. There was a change of venue from the regular judge; and the special judge below having been appointed to try the case, the cause was again submitted to the court for trial.

On request of appellee, the facts were again found specially, with conclusions of law. The second finding of facts and conclusions of law were substantially the same as on the first trial, as was also the judgment and decree which followed.

Numerous errors and cross-errors have been assigned.

The first question discussed by counsel is the ruling of the court upon the demurrer to the first paragraph of complaint, and the sufficiency of that paragraph to constitute a cause of action.

In the first paragraph of the complaint it is alleged that on September 30, 1859, Isaac R. Chambers, father of appellee, became the owner in fee simple of the land

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in controversy, being eighty acres in Boone county; that on October 3, 1864, the said Isaac R. Chambers, by warranty deed, conveyed the undivided two-thirds of said land to John and Susannah Chambers, who were his father and mother, during their natural lives, and at the death of the survivor of them to descend in fee simple to appellee, in the event that appellee should live to be twenty-one years of age, but if he should die before that age then the fee simple to descend to the legal heirs of said life tenants; that in October, 1864, the said Isaac R. Chambers died intestate, leaving as his only heirs at law his widow Catherine C. Chambers, and his son the appellee; that afterwards, in partition proceedings, thirty-one and one-ninth acres off the north end of said land were set off to said widow, and to the appellee thirteen and three-ninths acres immediately south of and adjoining the land set off to his mother, and to the said John and Susannah Chambers thirty-five and five-ninths acres off the south end of said tract; that on the 3d day of January, 1866, the said Catherine C. Chambers died intestate, the owner in fee simple of said thirty-one and one-ninth acres, leaving the appellee, then four years old, as her only heir; that on the death of his mother the appellee became a member of the family of John and Susannah Chambers, his grandparents, and so remained until he was twenty-one years of age; that the administrator of the estate of Isaac R. Chambers, after the partition, sold said thirteen and three-ninths acres in payment of the debts of the estate, and said land was purchased by the said John Chambers, who, in 1874, died seized in fee simple of the same; that no guardian was ever appointed for appellee, and that the said John Chambers and his family had full and exclusive possession of said thirty-one and one-ninth acres set off to appel-

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lee's mother, and received the rents and profits of the same; that when appellee became old enough to take interest in such matters, he frequently tried to ascertain from appellant and other members of the family what interest he had in said eighty acre tract, if any, but they always refused to give him any information on the subject, and did all in their power to divert his mind from said matter; that when appellee became twenty years of age he left the home and family of his grandmother, Susannah Chambers, the appellant being the real head of said family, and went amongst strangers to find some one who would act as his guardian for the purpose of looking after his interests, if he had any, in said real estate; that immediately afterward the appellant and some of his friends followed appellee, and persuaded him to abandon his intention of having a guardian appointed, and to return to the home of appellant, promising him an interest in the crops; that after appellant had so procured appellee to return home, he induced him to enter into a contract to sell his interest in said farm for the sum of five hundred and sixty-two dollars, the appellant at the time well knowing that the interest of appellee at the time was of the value of three thousand dollars, and appellee having no knowledge as to what such interest, if he had any, was worth; that on October 6, 1883, appellee became twenty-one years of age, and on the 7th day of October, 1883, appellant procured him to execute a quitclaim deed for the farm, in pursuance of said contract, paying to appellee on that day two hundred and sixty-two dollars, having paid him the other three hundred at the time the contract was made; that on the day when said deed was made said thirty-one and one-ninth acres which had been partitioned to appellee's mother, and which appellee had inherited from her in fee simple, was of the value of

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twelve hundred dollars, and the thirty-five and five-ninths acres partitioned to John and Susannah Chambers was of the value of eighteen hundred dollars; that on August 20, 1891, the said Susannah Chambers died, and it was not until after her death that appellee ascertained what his legal rights were in said real estate, and that he had been defrauded in the manner and form hereinbefore set forth, by his uncle, the appellant; that on the 30th day of November, 1891, he tendered to the appellant the sum of five hundred and sixty-two dollars in legal tender money of the United States, and demanded of him that he should reconvey to appellee the real estate to which he had induced him to execute a quitclaim deed; but the appellant refused to accept the money and reconvey said real estate; and the appellee now brings said money into court, and tenders the same to appellant; that the rents and profits of said thirty-one and one-ninth acres have been of the value of one hundred dollars per year for the past six years. Wherefore appellee demanded that said quitclaim deed be set aside, that he be adjudged the owner of said land in fee simple, and the appellant liable for said rents and profits.

It is not necessary that actual fraud should be shown in a case like this. The fraud may be constructive. In Tiedeman Eq. Juris., section 226, constructive fraud is said "to include all those cases of wrongful advantage obtained by one person over another, under circumstances which do not prove that the party obtaining the advantage has been guilty of any willful misrepresentation or untruth; but in consequence of a wrongful advantage obtained, a court of equity considers it inequitable, and affords relief from such undue advantage by the employment of appropriate remedies. These cases are denominated constructive fraud, because the partic-

ular remedies are the same as if there had been actual fraud."

The same authority, section 232, says that "Expectant heirs and reversioners are considered as being peculiarly susceptible to imposition, fraud, and undue influence; and particularly in regard to contracts made by them for the purpose of securing the cash value of such expectant interests. Courts of equity scrutinize all such agreements very closely."

In 1 Story's Eq. Juris. (13th ed.), section 337, the doctrine above noted is said to apply "not merely to heirs dealing with their expectancies, but to reversioners and remaindermen dealing with property already vested in them but of which the enjoyment is future, and is therefore apt to be underestimated by the giddy, the necessitous, the improvident, and the young. * * * And in regard to reversioners and remaindermen, if they are at the time necessitous, and laboring under pecuniary distress and embarrassment, an equally indulgent protection will also be afforded to them."

In section 338 of the same work, the following is quoted as a clear statement of the law, in the same connection: "In the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such person. But in more modern times it has been considered not only that those who were dealing for their expectations, but those who were dealing for vested remainders also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who deal with expectant heirs and reversioners the onus of proving that they had paid a fair price, and otherwise to undo their bargains and compel a reconveyance of the property purchased."

To the same effect, see 1 Beach Eq. Juris., sections

145, 146, as to expectant heirs, reversioners and remainders.

In 2 Pomeroy Eq. Juris., section 953, the author says: "Heirs, reversioners, and other expectants, during the lifetime of their ancestors and life tenants, are considered as peculiarly liable to imposition, and exposed to the temptation and danger of sacrificing their future interests, in order to meet their present wants.

* * * The rule is well settled that all conveyances, sales, and charges, and contracts of sale or charge, of their future and expectant interest made by heirs, reversioners, and other expectants during the lifetime of their ancestors or life tenants, upon an inadequate consideration, will be relieved against in equity, and either wholly or partially set aside. In this instance, fraud is inferred from mere inadequacy of consideration. * * *

In every such conveyance or contract with an heir, reversioner, or expectant, a presumption of invalidity arises from the transaction itself, and the burden of proof rests upon the purchaser or other party claiming the benefit of the contract to show affirmatively its perfect fairness, and that a full and adequate consideration was paid,—that is, the fair market value of the property, and not necessarily the value as shown by the life tables."

The foregoing authorities are quite sufficient to show that the contract and deed referred to in the first paragraph of the complaint were tainted with constructive fraud.

The appellee, who was the actual owner, in fee simple, of the thirty-one and one-ninth acre tract ever since the death of his mother, and who, on any theory of the complaint, was to become the owner in fee simple of the thirty-five and five-ninths acre tract on the death of his grandparents, was brought up in the family, of which his grandmother and his uncle, the appellant, were for

the greater part of his life the heads, in complete ignorance of his rights. When almost a man, he finally had vague surmises as to those rights, and sought amongst strangers for advice, and to have a guardian appointed to discover what his interests were, if he had any. He was followed by friends of appellant and persuaded to return home and forego all thoughts of the guardianship, with a promise that he should have a share of the crops.

Soon after, when he was about twenty years old, a bargain was struck with him by which he was to make a deed of his interest in the farm as soon as he should become of age, the consideration to be five hundred and twelve dollars, the land being at the time worth three thousand dollars.

We think the paragraph of complaint shows a good cause of action.

Appellee's deed was made in 1883. His grandmother, who was life tenant of the thirty-five acre tract, did not die until 1891, and the complaint to set aside the deed was filed a few months later. The action was begun in time, at least as to the thirty-five acres. The statute of limitations does not begin to run against a remainderman during the life tenancy. *Luntz v. Greve*, 102 Ind. 173; 13 Am. and Eng. Enc. Law, 720.

The facts found by the court are substantially those alleged in the first paragraph of the complaint.

It is claimed as error that the court, "after finding that the deed conveyed a portion of the land to John and Susannah Chambers, and to the survivor of them, then to go to Parson B. Chambers in fee simple, was an error. The only time the deed mentioned could have passed title was when it was executed and delivered. Deeds are not made to convey title in the future; they must carry the title at delivery or not at all."

We have set out counsel's contention on this point in full. We think it discloses no error in the court's conclusion of law.

While the remainder in the estate passed to appellee on the execution of the deed, yet the possession could not go to him during the life tenancy of his grand parents. In that sense it is strictly true, as the court concluded, that the land was conveyed to the grandparents for life, and then was to fall to appellee. His possession could only begin on their death. This is the reasonable interpretation of the deed.

In *Doren v. Gillum*, 136 Ind. 134, the words of conveyance in the deed were "convey and warrant to Levi Hubbard and Margaret Hubbard * * * to have and to hold the same during their natural lives, and each of their natural lives, and then to descend to William H. Hubbard and the heirs of his body."

It was there contended that the words "convey and warrant," in the premises of the deed, carried a fee to the first takers; that the word "descend" in the habendum clause was a word of limitation, and not of purchase, and implied an estate of inheritance in William H. Hubbard; that if, however, a life estate only was conveyed to Levi Hubbard and Margaret Hubbard then there was nothing to descend to William H., hence there was a contradiction, and the habendum clause being repugnant to the premises could not stand.

The court held that "the expression 'then to descend to William H. Hubbard and the heirs of his body' clearly refers to the time when said William shall come into the possession of the estate, and the remainder vested in him and became subject to levy and sale at the date of the execution of the deed. * * The deed creates a remainder interest in William H. Hubbard by purchase, and the use of the word 'descend' will not be allowed to

defeat or destroy the clear and well expressed meaning of the deed."

So in the deed now under consideration the expression, "then to go to Parson B. Chambers," considering the context, can only mean that the possession and enjoyment of the property shall go to him on the death of his grandparents.

Counsel agree that no inadequacy of consideration is shown for the quitclaim deed given by appellee to appellant. The consideration was five hundred and twelve dollars. It was proved on the trial, and found by the court, that the land, at the time, was worth twenty-eight hundred and thirty-five dollars. Counsel think that the incumbrance of the life estate should be taken into account in estimating the value. This the law does not permit in case of heirs, reversioners and remaindermen, making sale of their expectancy. The law looks upon such sales as gambling upon the lives of the ancestors or life-tenants, and so against public policy; and will only sanction the sale, as we have seen, when the full market value is paid. *McClure v. Raben*, 125 Ind. 139,

The court found that the thirty-one acre tract, inherited by appellee from his mother, was conveyed by the deed of appellee to appellant, and that the deed should not be set aside as to that tract. This counsel for appellee think was error, and cross-errors are assigned accordingly.

There is no doubt that the transaction was equally fraudulent with the conveyance of the thirty-five acre tract. But we think the statute of limitations was a good plea in answer to the complaint as to this tract. As to the thirty-five acre tract, held by the grandparents as life-tenants, the statute, as we have seen, did not begin to run until their death; but as to the thirty-one acre tract, which was held by appellee in fee-simple, the stat-

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ute began to run at the delivery of the deed. Actions for relief against fraud must be commenced within six years from the date when the right of action accrues.

We find no error in the record.

The judgment is affirmed.

Filed Oct. 10, 1894.

No. 16,865.

FLETCHER v. CRIST ET AL.

INTOXICATING LIQUORS.—License.—Remonstrance by Nonresidents of Township.—Striking Out.—While the statute (section 5314, R. S. 1881), authorizes only voters of the township wherein it is proposed to sell intoxicating liquors to remonstrate against the granting of a license, yet the refusal to strike out a remonstrance filed by voters of another township is harmless if a proper remonstrance, specifying the same grounds, is filed and prosecuted to the end.

SAME.—Query, whether, upon an application for license to sell intoxicating liquors in a town situated partly in three townships, and the giving notice to the citizens of the three townships, any citizens may remonstrate except those residing in the township in which the proposed place of sale is situate?

SAME.—Sufficiency of Remonstrance.—How Tested.—The sufficiency of the facts stated in a remonstrance against the granting of a license to retail intoxicating liquors may be tested by demurrer, but not by a motion to strike out parts thereof.

SAME.—Motion to Strike Out Separate Specifications.—The overruling of a motion to strike out separate specifications in a remonstrance is not available error.

SAME.—Juror.—Disqualifying Opinion.—Challenge.—One who, upon his *voir dire*, says that he has a strong prejudice against saloons, which, however, he thinks he can lay aside; that he hardly believes a man can be moral and sell liquor, and that he is opposed to granting license to any person to sell liquor under any circumstances, is not competent to sit as a juror upon the trial of an application for license to sell intoxicating liquors, and an error in overruling a challenge for cause is not cured by a peremptory challenge.

139	121
146	671
139	121
148	149
149	398
149	704
150	377
151	74
139	121
164	224
139	121
168	563

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SAME.—*Partial Juror*.—One who upon his *voir dire*, in such a case, says that he thinks it is evidence of immorality for a man to engage in the sale of intoxicating liquors, is not impartial, and a challenge for cause should be allowed.

From the Parke Circuit Court.

G. D. Hurley, M. E. Clodfelter and S. D. Puett, for appellant.

B. Crane and A. B. Anderson, for appellees.

MCCABE, J.—The appellant applied to the board of commissioners of Montgomery county for a license to sell intoxicating liquors in a less quantity than a quart at a time, in a certain room in a certain building in the village of New Market, in Brown township, in said county. Upon the hearing the board refused the license and the applicant appealed therefrom to the circuit court of the county, and the venue of the cause was changed to the Parke Circuit Court. A jury trial in that court resulted in a verdict and judgment in favor of the remonstrators and against the applicant over his motion for a new trial. Two remonstrances had been filed before the board, one by the voters of Brown township and one by the voters of Scott and Union townships.

The trial court overruled a motion by the appellant to strike out the remonstrance of the voters of Scott and Union townships, and also a motion to strike out certain portions of each of said remonstrances. The contents of the two remonstrances were alike in all respects. But it is contended by the appellant, that none but legal voters of the township in which it was proposed to sell the liquor were authorized to remonstrate. R. S. 1894, section 7278 (R. S. 1881, section 5314).

As an excuse for the filing of the remonstrance by the voters of Scott and Union townships the appellees contend that it was authorized under the circumstances, be-

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cause the village of New Market, wherein the premises in which it was proposed to sell liquors, is situate partly in all three townships where they corner; and that the appellant's notice of application for license was to the citizens of New Market and to the citizens of all three townships, by naming in such notice all three townships. The statute authorized no one to remonstrate against the granting of such a license but a voter of the township. *List v. Padgett*, 96 Ind. 126.

However, it is unnecessary to decide whether the voters of Scott and Union townships had a right, under the circumstances, to remonstrate or not. If they had not, the refusal to strike out their remonstrance would be at most a harmless error. Because those who did have a right to remonstrate against the granting of the license had done so specifying the same grounds of remonstrance that the voters of Union and Scott townships had specified; and they continued to vigorously prosecute the same to the end.

If the evidence was contrary to or insufficient to support the verdict, that opposition or insufficiency would not have been either increased or decreased, by striking out such remonstrance. The result could not, and would not, have been changed by striking out the remonstrance of the voters of Union and Scott townships. The evidence of unfitness of the applicant to be entrusted with a license was all admissible under the remonstrance of the voters of Brown township, and the other remonstrance had no influence in producing the verdict or in preventing a verdict the other way.

The motion to strike out parts of the remonstrance went to each and all of the grounds specified therein against the granting of the license. Had the motion been sustained, there would have been no grounds stated in the remonstrance why the license should not be

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granted. In short, there would have been no facts whatever left in the remonstrance; there would have been no remonstrance left on file. It would have been too late to file a remonstrance in the circuit court had the court sustained the motion to strike out. *Miller v. Wade*, 58 Ind. 91; *List v. Padgett*, *supra*. Had a demurrer been filed to the remonstrance or the several specifications thereof separately for want of sufficient facts, and it had been sustained, the remonstrance could have been amended. *Stockwell v. Brant*, 97 Ind. 474. We learn from the brief of appellant's counsel that the motion to strike out was designed by them to test the sufficiency of the several specifications in the remonstrance to constitute a defense to appellant's application. A motion to strike out does not, and can not, perform the office of a demurrer. *Port v. Williams*, 6 Ind. 219; *State, ex rel., v. Newlin*, 69 Ind. 108; *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258.

This case furnishes a strong illustration of the propriety and necessity of the rule. If the facts stated in the remonstrance were relevant, yet insufficient to constitute a defense to the application, or to constitute a sufficient reason why the license should not be granted, and they are struck out on motion, the remonstrator has no remedy, though the most abundant reasons exist why the license should not be granted, because he can not file a new remonstrance in the circuit court, as we have already seen. Had the objection been taken by demurrer, on the same being sustained, he could have amended the remonstrance so as to make its statement of facts sufficient to warrant the refusal of the license. If it be said that the motion to strike out was directed to the several specifications in the remonstrance separately, and that under it portions might have been stricken out, and other portions left in, then we answer

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that it is the established rule that overruling a motion to strike out a part of a pleading is not available error. *Walker v. Larkin*, 127 Ind. 100; *McFall v. Howe, etc., Co.*, 90 Ind. 148; *Losey v. Bond*, 94 Ind. 67; *Morris v. Stern*, 80 Ind. 227; *City of Crawfordsville v. Brundage*, 57 Ind. 262.

The sufficiency of the facts stated in the remonstrance is not attempted to be presented here in any other way than by the motion to strike out. Therefore, we hold that the sufficiency of the facts stated in the remonstrance, and the several specifications thereof, is not presented by the record for our consideration and decision.

One Ed Thomas was called as a juror, and on his *voir dire* in answer to proper questions, stated that he had a prejudice against saloons, and that his prejudice was strong, though he thought he could lay it aside, and that he hardly believed a man can be a moral man and sell liquor, and that he was opposed to granting license to any person to sell liquor under any circumstances.

Another juror, one James A. Bain, stated in answer to proper questions on his *voir dire*, that he did not like saloons. Did not know that he would oppose granting a license to sell liquor; that he thinks it is evidence of immorality for a man to engage in the sale of intoxicating liquors; that he expected that he could return a fair and impartial verdict upon the law and the evidence in the case; that he could so far as the law and evidence goes.

Both jurors were challenged by the appellant for cause, but the court overruled the challenges, and the appellant excepted.

We regret that appellee's counsel have wholly failed to notice the argument of appellant's counsel on the question of the competency of these jurors, or to suggest any reason on which it is supposed that the ruling of the

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court thereon can be sustained, though they have ably briefed the case on other questions involved in the record.

The exact question as to the competency of the juror Thomas was decided against his competency in *Keiser v. Lines*, 57 Ind. 431. In answer to the question whether a person called as a juror in that case had formed or expressed an opinion as to the merits of the case, the juror answered: "No; but I am opposed to granting license to any person, under any circumstances." The trial court overruled the challenge. This court there said: "We think the challenge for cause should have been allowed. The answer of the juror, that he 'was opposed to granting license to any person, under any circumstances,' was equivalent to saying, that he was opposed to granting license to the appellant, if he established his right to obtain license according to law. That a juror, entertaining such an opinion, was incompetent to sit in the case, is a proposition which seems so plain to us that we think reasons given in its support would be thrown away. The independence, freedom from interest, impartiality, and the unbiased opinion of jurors must be secured to all, or justice can not be administered."

To the same effect are *Chandler v. Ruebelt*, 83 Ind. 139; *Stoots v. State*, 108 Ind. 415.

The juror Thomas was afterwards peremptorily challenged by the appellant, so that he did not serve. But that does not cure the error of overruling the challenge for cause. *Brown v. State*, 70 Ind. 576.

This court there said: "It can not be correctly said, * * that these peremptory challenges were allowed for the purpose of correcting the errors of the trial court, in overruling the defendant's challenges for cause. There can be no doubt, we think, that the appellant was prejudiced and injured by the decisions of the court in overruling

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her challenges for cause as to the jurors, Tyner and Dawson, in this, that she was thereby compelled, as we assume, to use two of the peremptory challenges allowed her by law for other purposes, to relieve herself, as far as she could, from the erroneous rulings of the court on her challenges for cause."

In *Chandler v. Reubelt*, *supra*, the appellant was an applicant for a license to retail intoxicating liquors, which had been refused by the board, and he appealed. A juror called in that case said, in answer to a proper question, that he did not think a moral man would sell liquor; but, notwithstanding his prejudice, he believed he could render a verdict according to the law and the evidence. This court held such juror not impartial, and therefore an incompetent juror.

The answers of the juror Bain brought him within the rule here laid down, and show that he was not an impartial juror, that he had prejudged one feature of the case. The morality of the applicant was directly involved in the controversy, and his opinion was that it was evidence of immorality for a man to engage in the sale of intoxicating liquors. Appellant's application showed that he was willing to so engage, and would do so if licensed. According to the juror's answers he must necessarily believe that fact evidence of appellant's immorality. This juror served in the cause. We are of opinion that both jurors were, under the decisions cited, incompetent, and that the court erred in overruling the appellant's challenge of them for cause.

As a new trial will necessarily result from what we have said, it is unnecessary to decide the other questions discussed, as they are not likely to arise on another trial.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial.

Filed Oct. 31, 1894.

No. 17,226.

THE BOARD OF COMMISSIONERS OF RUSH COUNTY ET AL.
v. DINWIDDIE ET AL.

WILL.—Trust.—Home for Unfortunates.—Board of County Commissioners Competent to Act as Trustee.—A board of county commissioners in this State is competent to act as a trustee under the will of an individual, where the object of the trust is to establish a home for worthy, unfortunate persons and orphan boys.

SAME.—Beneficiaries.—Selection in Discretion of Trustee.—A failure in the will to confine the beneficiaries of the trust to residents of the county does not invalidate the trust, and certainly not where the board of commissioners is made the judge of everything that is necessary relating to the trust, and is given full discretion in the selection of the beneficiaries from the class of persons named.

SAME.—Bequest of National Bank Stock.—Right to Hold.—Perpetuities.—A bequest to a board of county commissioners, as trustee, of stock in a National bank "to be kept as a perpetual fund, to remain in said bank while it exists," does not invalidate the gift, even though, under the banking laws, a corporation can not hold such stock, where the will invests the trustee with discretion as to what is necessary to be done. Nor does this provision violate the statute against perpetuities.

SAME.—Church.—Provision Requiring Trustees to Build.—A trust created by will in a board of county commissioners whereby a home is to be provided for worthy, unfortunate persons and orphan boys is not rendered invalid by a provision requiring a church to be built in connection with the home.

SAME.—Partial Intestacy.—Presumption Against.—Meaning of Testator.—In interpreting wills the presumption is always against partial intestacy, and the meaning of the testator must be sought from the whole instrument.

SAME.—Disposition of Entire Estate.—Construction of Will.—A testatrix after disposing of her home farm to a board of county commissioners, as trustee, and providing for the establishment of a home by them for the benefit of a class of persons, then devised to named persons in trust "all my remaining estate to be managed by them as by me directed." The directions being to handle the property without sacrifices, and, when they were through with the trust, to "turn all over to the commissioners * * * for the benefit of the needy with as little cost as possible."

Held, that the will disposes of all of the testatrix's property.

139	128
141	331
139	128
147	427

The Board of Commissioners of Rush Co. *et al.* v. Dinwiddie *et al.*

From the Rush Circuit Court.

B. L. Smith, C. Cambern, G. H. Punttenney, H. E. Barrett, W. J. Henley and L. D. Guffin, for appellants.

J. C. Blacklidge, C. C. Shirley, B. C. Moon, D. S. Morgan, D. Morris, G. W. Morgan and S. L. Innis, for appellees.

HOWARD, J.—The appellees filed their complaint in two paragraphs, in each of which they alleged that, as sole heirs at law of Maria Dinwiddie, deceased, they were the owners in fee simple as tenants in common of certain described real estate, praying that their title be quieted and for partition.

To this complaint the appellants answered jointly in two paragraphs, and the board of commissioners also separately in two paragraphs. In each paragraph of both answers was set up a copy of the last will of the said Maria Dinwiddie, under the terms and provisions of which it was averred that the appellant, board of commissioners, was the owner of the lands described in the complaint.

The appellees demurred to each of the answers, and the demurrers were sustained by the court. The correctness of this ruling is brought here for decision. To decide the question so raised, it becomes necessary to pass upon the validity of the last will of Maria Dinwiddie, in so far at least as relates to the lands devised by her.

No question is raised as to the competency of the testatrix to make her will, or to the due execution of the same, the sole question being whether the will is sufficient to effect the purposes intended by her.

The will was written by the testatrix herself. It is wholly unpunctuated, and without division of sentences by capitals. So far as need be set out, it is as follows:

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"I give to the county commissioners of Rush County State of Indiana and their successors in office my farm containing one hundred and sixty acres situated in Jackson Township Rush County known as the Dinwiddie farm on which to establish a home for the benefit of worthy persons who have no home and orphan boys where they can be learned to work and be made self supporting the home limited in number to as many as the farm will comfortably support it is not to be called a poor house but a home where worthy unfortunate persons can be enabled in a measure to support themselves The home to be called the Dinwiddie Home I also give to said Commissioners my bank stock in the Rushville National Bank to be kept as a perpetual fund to remain in said Bank while it exists after such Bank ceases to exist said Commissioners or their successors shall invest the fund in some safe way where the most interest can be secured all of the interest accruing from said fund to be used for the benefit of the home in the way of building and other necessary repairs and furnishing stock and implements necessary to carrying on said farm the Coms being the judges of what is necessary they to be held by the County responsible for the judicious management of all trust committed to them No dissipated wicked persons are allowed the benefit of the home

"in the second place I leave in the hands of my nephew William A. Smith and Thomas M. Green in trust all my remaining estate to be managed by them as by me directed they not being required to give bond believing they will faithfully and honestly discharge the trust committed to them"

Next follow numerous special bequests concerning which there is no dispute, after which the will continues:

"all bequests herin named are to be paid out of money on deposit and promissory notes held by me my trustees

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to hold my business houses not disposed of collecting the rents and keeping up necessary repairs the residue used in complying with my wishes providing there are sufficient which I think there will be I desire to have a substantial church built on the Home Farm after I am called away if such is not built while I remain the church to be a plain substantial structure not to cost over three thousand dollars the foundations to be stone the walls brick with slate roof plainly and substantially finished inside it is not to be sectarian all denominations permitted and requested to hold religious services as often as convenient if there should be any means left after all requirements are fulfilled the same can be kept in some safe investment the income used in keeping the church supplied with preaching and other religious exercises.

"My Trustees are allowed ample time to make arrangements without any sacrifices I would say ten years, if necessary if needed when they are through with the trust they can turn all over to the county commissioners and their successors if all parties think it would be best for the estate to retain the houses and lots they can do so my wish is that the uses be made of the estate for the benefit of the needy with as little cost as possible.

"July 10, 1891.

MARIA DINWIDDIE.

"Witnesses { J. W. SMELSER.
JAMES T. KITCHEN.

"this is my own Will written by my own hand."

It is first contended that the devise and bequests to the commissioners are void, for the reason that the county board is not competent to take the same.

By section 2726, R. S. 1894 (section 2556, R. S. 1881):
"All persons, except infants and persons of unsound mind, may devise, by last will and testament, any interest, descendible to their heirs, which they may have in

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any lands, tenements, and hereditaments, or in any personal property, to any person or corporation capable of holding the same."

Whether the board of county commissioners is such a corporation, capable of receiving and holding a devise or bequest of property for uses in harmony with the purposes for which the board has been created, seems hardly to admit of doubt.

In Perry on Trusts, section 42, the author says: "At the present day corporations of every description may take and hold estates, as trustees, for purposes not foreign to the purposes of their own existence; and they may be compelled by courts of equity to carry the trusts into execution."

In section 43 of the same work, it is said: "If the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them, if it accepts them. Thus towns, cities, and parishes may take and hold property in trust for the establishment of colleges, for the purpose of educating the poor, for the relief of the poor, * * * and for the support of schools, or for any educational or charitable purposes within the scope of its charter."

The general purposes of the organization of the board of commissioners must be sought in the constitution and in the statutes of the State.

By section 10, article 6, of the constitution: "The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character."

By section 3, article 9, the constitution provides that:

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"The county boards shall have power to provide farms as an asylum for those persons who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society."

By section 8163, R. S. 1894 (section 6087, R. S. 1881), and following sections, the Legislature has exercised these constitutional powers, and county boards are invested with the supervision of matters relating to the poor, including the purchase of land in the name of the county for an asylum.

Aid is also authorized in numerous special cases to care for helpless and unfortunate persons.

By section 4596, R. S. 1894 (section 3508, R. S. 1881), and following sections, county boards may grant aid to voluntary orphan asylums, or may purchase homes for such asylums.

By section 7878, R. S. 1894 (section 1954, Elliott's Supp.), they are expressly authorized to appropriate not to exceed twenty-five thousand dollars to aid in "establishing a home for worthy, indigent old women," whenever a like amount "has been given, devised or bequeathed in trust" for that purpose.

The trust provided for in the will of Maria Dinwiddie, was "to establish a home for the benefit of worthy persons who have no home, and orphan boys where they can be learned to work and be made self-supporting, the home limited in number to as many as the farm will comfortably support, it is not to be called a poor house, but a home where worthy, unfortunate persons can be enabled in a measure to support themselves."

It would seem, from the provisions of the statute, and the constitution, that such a trust is "within the general scope of the purposes" for which the county board was instituted. But even if collateral to the general purposes of the board, it is certainly germane to them;

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for the trust relates to matters which will promote and aid those general purposes, namely, the care of those who, as the constitution so beautifully states it, "have claims upon the sympathies and aid of society."

But the question raised by counsel is hardly an open one in this State. In *Craig, Admr., v. Secrist*, 54 Ind. 419, it was held that a county has the legal capacity to take a devise of the property of a testator, as a permanent fund, the income from which is to be used in educating the colored children of the county. In *Board, etc., v. Rogers*, 55 Ind. 297, the devise was of real estate "to the commissioners of the county of LaGrange, aforesaid, and their successors in office, forever, * * * in trust and for the use and benefit of the orphan poor, and for other destitute persons, of said county." This devise, which was held good, was very much like that in the will before us. Both the foregoing cases were approved in the case of *Skinner v. Harrison Tp.*, 116 Ind. 139. The devise in the latter case was also of real estate, and was made to a township for the use of the common schools of the township. MITCHELL, J., said in that case: "A municipal corporation may be a trustee under the will of an individual when the trust created is germane to the purposes for which the corporation was called into being, and when the administration of the trust, and the liabilities it imposes, are not foreign to the objects for which the corporation was instituted." Citing many authorities, including 2 Dill. Munic. Corp., section 567.

But it is said that the will of Maria Dinwiddie names as beneficiaries persons not confined to Rush county, whereas the jurisdiction of the commissioners who are named as trustees does not extend beyond the limits of the county. Since the testatrix made choice of the commissioners of the county as her trustees, it may be rea-

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sonably inferred that she thus intended to limit the beneficiaries to "worthy persons who have no home, and orphan boys," resident, or at least present, within the limits of the county.

Besides, it is the law "that a gift of charity is maintainable in this State, if made to a competent trustee, and if so defined that it can be executed as made by the donor by a judicial decree, although the beneficiaries are not designated by name or specifically pointed out, if the trustee is invested with full and ample discretion to select the beneficiaries of such charity from the class of persons named." *Grimes' Exrs. v. Harmon*, 35 Ind. 198. The trustees in this case before us are competent, as we have seen, and to them is all discretion given, as to the selection of the beneficiaries from the class named, as well as in everything else relating to the home. The commissioners, as her trustees, are expressly declared by her to be "the judges of what is necessary, they to be held by the county responsible for the judicious management of all trust committed to them." The commissioners being thus made the judges of whatever is to be done in relation to the trust, must therefore select out of the class of "worthy persons who have no home, and orphan boys," such persons as they may deem most fitted for the home, and most needful of its advantages.

They must not be "dissipated or wicked persons"; and they must be "limited in number to as many as the farm will comfortably support." Otherwise, the commissioners, "responsible for the judicious management of all trust committed to them," are charged with the duty of making a proper selection. They may, therefore, confine their choice to inhabitants of Rush county; as was, perhaps, the intention of the testatrix in selecting the county commissioners as her trustees. Yet, it is not the part of the court to set bounds to the generous be-

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nevolence of the testatrix; and we perceive nothing in the broad charity of the will, nothing in the duties of the commissioners as fixed by statute, that would forbid their receiving as inmates of the home any suitable members of the designated class who should present themselves before the board. The fund to be disbursed is not raised by taxation, but is the free bounty of the founder of the charity.

The important matter is, that the commissioners themselves are made "the judges of what is necessary," in this, as in all other matters relating to the trust.

Woodruff v. Marsh, 63 Conn. 125, is a late case in point, and, as counsel well say, "is entitled to consideration for the reason that Connecticut has followed, to a great extent, the same doctrine that Indiana has," in relation to charitable uses and trusts. The bequest, in that case, reads: "And also the sum of four hundred thousand dollars, for the purpose of maintaining and supporting a home for destitute and friendless children, permanently, on the above described premises, and to be known as the 'William L. Gilbert Home'; the same to be under the care and control of the above-named persons as trustees."

It was contended by the heirs at law in that case, as it is in this, that the devise and bequest was "void for indefiniteness, uncertainty, and the absence of any grant of power to select the beneficiaries."

The words "care and control," used in that will, are the only words which could give the trustees the right to select the beneficiaries. The court held that the "care and control" given to the trustees was not limited to the fund but extended to the institution, and that this control of the institution involved the power to select the individuals who should receive the benefit of it.

In that case the trust was for "destitute and friendless

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children"; in this it is for "worthy persons who have no home and orphan boys." A permanent home, the "William L. Gilbert Home," in the one case, and the "Dinwiddie Home" in the other, is the means provided to accomplish the charitable purpose. The trustees are given "care and control" of the home in the one case; in the other they are made "the judges of what is necessary," and "responsible for the judicious management of all trust committed to them."

In both cases, the test of a valid charitable trust, as applied by BUSKIRK, J., in the case of *Grimes' Executors v. Harmon*, *supra*, is fully satisfied: "If * * * certain and ascertainable trustees are appointed," Judge BUSKIRK says, "with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity."

Another objection raised is, that the will gives the board of commissioners, in trust, the "stock in the Rushville National Bank, to be kept as a perpetual fund—to remain in said bank while it exists."

It is said that this bequest must fail, and with it the whole trust, because only natural persons can hold National bank stock. Should the commissioners be unable to retain the stock under the banking laws, that will not invalidate the gift; they may invest the value of the stock in some other way; as, in fact, the will itself provides they shall do after the bank ceases to exist. The trustees are here also "the judges of what is necessary"; they have taken her place and must do what may be necessary to carry out the trust in circumstances which she could not foresee.

It is also considered as invalidating the trust that the testatrix provided for a church at the home. Every educational, benevolent and penal institution has its

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chapel exercises. The houses of the General Assembly, and of Congress, are opened with prayer. It is clear, from the words of the will, that the testatrix intended only to provide chapel exercises for the moral instruction of the inmates of the home. She evidently thought that moral training, no less than intellectual and physical, was necessary for the comfort of the older and the education of the younger inmates of the home. We can see nothing in this objection.

It is next contended that the bequest of bank stock is invalid as in conflict with the statutes against perpetuities (sections 3382, 8133, R. S. 1894; sections 2962, 6057, R. S. 1881).

We do not think these statutes are violated. She calls the bank stock a perpetual fund, to remain in the bank while it exists. This is far from meaning forever. Indeed she provides in the very next words that when the bank ceases to exist the commissioners shall seek some other safe investment for the funds. A reasonable interpretation of these words means only that the trustees shall take the utmost care in securing the safety of the funds; and she knew no safer place for her money while the bank lasted than to keep it there.

It is next contended that the last clause of the will shows that a certain part of the property is left undisposed of by the will. We think it very clear that counsel misapprehend the plain meaning of these words. It is a fixed principle of the interpretation of wills that the presumption must be always against partial intestacy, and also that the testator's meaning must be sought from the whole context, and not alone from separate parts of the will. So considering this will, we shall find that there is no lapse in any devise.

After disposing of her farm, directly, to the commissioners, and providing for the establishment of the home

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by them, she says: "In the next place I leave in the hands of my nephew William A. Smith and Thomas M. Green, in trust, all my remaining estate, to be managed by them as by me directed." And, at the close, she makes further directions as to this property: "My trustees are allowed ample time to make arrangements without any sacrifices, I would say ten years if necessary, if needed. When they are through with the trust they can turn all over to the commissioners and their successors. If all parties think it would be best for the estate to retain the houses and lots, they can do so. My wish is that the uses be made of the estate for the benefit of the needy, with as little cost as possible."

There is here some repetition and awkwardness of language, but the meaning shines clear through it all. Besides the property put into the hands of the commissioners directly, there was a large amount, including some houses and lots, and notes out, that required such attention as the commissioners could not well give. This last property was put into the hands of two trustees, to collect and gather in all her estate, after which they should "turn all over to the commissioners." If it was thought best, in the interests of her estate, that the houses and lots should be retained, why the commissioners might do so. She made the suggestion, they were the sole judges of what might be necessary. But these lots, whether to be sold or retained, and all the other property left in trust, for settlement, with Smith and Green, when they were through with their trust, should go to the permanent trustees, the county commissioners, to whom all her property, real and personal, except the special legacies, was devised and bequeathed for the establishment of the home. This is the reasonable and consistent interpretation of the will, when taken altogether, as it must be.

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Counsel for appellees base much of their argument for the setting aside of this trust upon the case of *Grimes' Executors v. Harmon, supra*. That case is a mine of legal learning and profound reasoning upon the subject of charitable trusts and uses. We do not think, however, that there is anything in that case to show that the trust in this case should fail. The trust in that case failed for want of a trustee. The bequest there was "to the orthodox Protestant clergymen of Delphi and their successors, to be expended in the education of colored children."

The court found that when the will was executed no organized or corporate body known as "the orthodox Protestant clergymen of Delphi" was in existence. There was, therefore, no person or corporation with whom the trust might rest.

In *Erskine v. Whitehead, Exr.*, 84 Ind. 357, it was well said of the case of *Grimes' Exrs. v. Harmon, supra*, by Woods, J., that "If there had been a good appointment of trustees it is by no means clear that the will of Samuel Grimes should not have been deemed valid as conferring upon trustees the power to select the particular individuals who should receive the benefit of the fund."

In Perry Trusts, section 713, a similar criticism is made on the same case. See also *Cruse v. Axtell*, 50 Ind. 49, and *Haines v. Allen*, 78 Ind. 100; *McCord, Exr.*, v. *Ochiltree*, 8 Blackf. 15; *Vidal v. Girard's Exrs.*, 43 U. S. (2 How.) 126; Perry Trusts, sections 720, 721.

In the case at bar there is a noble charity provided, there are trustees ready and willing to receive the funds and to execute the powers conferred by the will, and to select the objects of the trust and thus make them certain and apply the funds in aid of the objects so selected. It is quite unnecessary to invoke any extraordinary powers, such as would have been necessary to make the trust valid in the case of *Grimes' Exrs. v. Harmon, supra*.

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All that is needed is the application of a liberal rule of construction, which will always be exercised by a court of equity in favor of a charitable trust. *Erskine v. Whitehead, Exr., supra.*

The judgment is reversed, with instructions to overrule the demurrers to the answers and for further proceedings.

Filed June 7, 1894; petition for a rehearing overruled Oct. 17, 1894.

No. 16,809.

SALEM STONE AND LIME COMPANY v. GRIFFIN.

139	141
143	366
139	141
146	569

CONTRIBUTORY NEGLIGENCE.—Negation of.—Special Averments of Facts.
—A general allegation that the plaintiff was free from negligence contributing to the injury sued for, is not overcome by specific averments of facts unless they show that he knew, or had opportunity to know, of the danger.

MASTER AND SERVANT.—Safety of Premises.—Assumption of Hazards.—Pleading.—Where it is alleged that “the usual, ordinary and safest” way of passing from an elevated tramway into the defendant’s adjoining mill was through a dormer window, it can not be assumed from an averment that the plaintiff’s (the servant’s) first use of the window was in passing from the tramway into the mill that he had mounted the tramway by a safer method, and that he therefore assumed the hazards of the use of the window.

SAME.—Construction of Premises.—Equality of Knowledge.—Where the dangerous agencies leading to the injury of an employe arise out of the negligent construction of the premises, he is not bound to show absence of opportunities, equal to the employer’s, for discovering the danger.

SAME.—Prior Injury to Another at Same Place.—Evidence of Admissible to Show Notice to Master.—For the purpose of showing notice to the employer of a dangerous condition, evidence that prior to the injury sued for another person was injured at the same place in the same way, is admissible.

SAME.—Freedom from Fault.—Instruction as to.—An instruction that an employe, who has used ordinary care to discover the dangers of the

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place in which he works, and who is injured by reason of a danger not so discoverable, is free from fault, is not objectionable, if the conditions necessary to a recovery are fully given in other instructions.

SAME.—*What Risks are Assumed and What Not.*—*Notice to Employe of Danger.*—Implied assumptions of risks are only such as are naturally incident to the service, and those which are known, or discoverable by ordinary care, but disregarded by the servant. Dangers which are unknown to the servant, or not discoverable by ordinary care, but which are, or should be, by ordinary care, known to the master, are not assumed, and as to such the master is bound to give notice.

SAME.—*Time of Giving Notice.*—Notice of an unassumed danger must be given before the service involving it is required, and it is not necessary that it should be given at the time of the contract of employment; but where no notice was given at any time, an instruction fixing it at the time of employment is harmless.

SAME.—*Walk.*—*Use of.*—*Ignorance of Danger.*—*Contributory Negligence.*—A walk constructed along a tramway is an invitation to its use, and a servant going upon it in the performance of a duty, without knowledge of dangerous projections from the tramway cars which make it unsafe, is not guilty of contributory negligence.

INSTRUCTIONS TO JURY.—*Burden of Proof.*—An instruction that the plaintiff "in a civil case, where he has established his complaint, that is, the vital, material facts set out in the complaint, should recover," is not harmful if, considered in connection with other instructions, the case is properly given to the jury.

From the Jackson Circuit Court.

M. Z. Stannard, for appellant.

J. A. Zaring and *M. B. Hottel*, for appellee.

HACKNEY, C. J.—The complaint by the appellee charged that the appellant was engaged in quarrying, sawing, and dressing stone, and in making lime, in which business it occupied a mill and operated a tramway for handling and shifting stone, which tramway was elevated to the height of the roof of said mill and its track ran near said roof. From said roof projected a dormer window two feet wide by three feet high, constructed by the appellant for, and used by employes as, a passage way from said mill and the ground below said tramway, that

being the best way provided for reaching said track. The distance between said track and said dormer window was about twenty-six inches, and in the operation of the carriages, or "travelers," upon said track, the timbers, rods and chains were negligently permitted to project beyond the track from sixteen to eighteen inches, and to within four to eight inches of said dormer window. The appellee was in the service of the appellant from some time in March, 1891, until the 18th day of August, 1891, his principal service being in the yards wheeling spawls and chips from the planer, and on said last named day he was required to perform the service of a "hooker" in attaching and detaching the hooks of one of the carriages while removing stone. In this service it became his duty to assist in replacing upon the track one of the wheels of such carriage which had become derailed, and while upon the tramway for that purpose he was sent to procure a wrench from within the mill. He proceeded over the tramway and passed down into the mill through said dormer window and returned through said window when, just as he had gotten upon said tramway, he was caught between said dormer window and the projecting timbers, rods and chains of another of the carriages operated upon said tramway, and sustained the injuries complained of.

The alleged negligence of the appellant was in constructing said dormer window so close to said track and in permitting said projections so as to be dangerous to employes, and so as to require one passing through said dormer window to stoop in such manner that he could not see, without special care to stop and make observation, before going upon the tramway, to learn if a carriage was approaching; that appellant had negligently directed said service, which was more hazardous than that he had before performed, without notice or warning

to him of the dangers thereof, though appellant knew said dangers and appellee's ignorance thereof.

Besides the general allegation of noncontributory negligence as to the appellee, it is alleged that he had no knowledge of the close proximity of said carriage projections when moving to said dormer window; that his service had never made it necessary for him to observe the construction or operation of said carriage or its nearness to said dormer window; that he had never passed through said window until he was sent for said wrench, and he was wholly unacquainted with the construction and operation of like machinery; that he did not see the approaching carriage, and could not have seen it without stopping and making special observation before passing from the window, and that he could not hear the approaching carriage because of the noise of the workmen and machinery in the mill.

The first question for consideration is the sufficiency of the complaint, and the appellant insists that facts are specifically pleaded which charge the appellee with knowledge of the alleged dangers and with contributory negligence, overthrowing the general allegation of noncontributory negligence.

It is first assumed that in the line of his duties in wheeling spawls and chips in the yard of the appellant, the appellee acquired a general knowledge of the construction of the mill, dormer windows, tramway and carriages in their relations one to another. For aught that appears from the complaint, the appellee's service was not within sight of the tramway and dormer window, and the general allegation that he possessed no knowledge upon this subject, must prevail, unless it may be said that this knowledge was acquired on the day of the injury, for it will be remembered that it was not until that day that he served as "hooker," and we can not say, in

the presence of the general allegation, that he could see, from his location as "hooker," that the track was but 26 inches from the dormer window, and that the timbers, rods and chains of the carriage occupied nearly all of that space. But, it is said, that he was upon the tramway assisting in replacing the carriage wheel upon the track, and that he then learned that the carriage timbers, rods and chains projected, and that when he went over the tramway and down through the dormer he did, or should have, observed that the space between the track and the said window would not admit of his returning over said track. If the carriage which he was assisting in replacing upon the track had been the same that inflicted the injury, the assumed knowledge or opportunity for knowledge would be more reasonable, but when we recall the fact that it was another carriage, the projections from which caught the appellee, we are not at liberty to assume the knowledge or opportunity for knowledge, as contended.

It is also insisted that since the alleged first use of the dormer was in going from the tramway, we must assume that he got upon the tramway by another and safe means, and that it was, therefore, a voluntary assumption of the hazards of the use of the dormer. It is expressly alleged that the passage way through the dormer "was the usual, ordinary and safest mode and way for defendant's employes" to pass back and forth to and from the tramway. We think, therefore, that the assumption that the appellee mounted the tramway by some provision safer than the dormer, is unwarranted. If we could indulge the presumptions so forcibly and ably urged by counsel, the case cited, *Stewart, Admx., v. Pennsylvania Co.*, 130 Ind. 242, would be of controlling influence.

In that case the opportunities of the servant for know-

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ing the time and speed of trains passing the point where he alighted from the train upon which he rode to his work, were apparent from the fact that he had been engaged in working upon a bridge of the company at that point, and if that knowledge had not been assumed, the fact that he alighted on the side of danger instead of the side of a safe landing, and, though enveloped in smoke and steam, and unable to hear an approaching train because of the noise from his own train, he took the hazardous step upon the track was not ordinary care.

It is further insisted that the complaint was defective in not showing that the appellee's opportunities for discovering the dangerous agencies complained of were not equal to those of the appellant. The dangerous agencies were not in the ill repair or falling into decay of the structures, but were in the negligent construction, a fact necessarily known and charged to the knowledge of the master, while the facts are pleaded which not only disaffirm knowledge by the appellee, but, as we have said, deprive us of the power to assume that he had opportunities to know of such dangers. We conclude, therefore, that the complaint was not subject to any of the objections urged to it by appellant's learned counsel.

Upon the trial, a witness for the appellee was permitted, over the appellant's objection and exception, to testify that, prior to the time when appellee was injured, another was injured at the same point, and in being caught between the dormer and the carriage projections. The court admitted the evidence for the purpose of showing notice to the appellant of the dangerous condition of the premises. This was not error. *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378; *City of Ft. Wayne v. Coombs*, 107 Ind. 75; *City of Delphi v. Lowery*, *Admx.*, 74 Ind. 520.

The next inquiry arises upon the charges of the court,

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the fourth of which was as follows: "The plaintiff, however, in a civil case where he has established his complaint—that is the vital material facts set out in the complaint—should recover." It is said that the rule thus laid down loses sight of any defense or defenses that might be asserted, and permits a recovery upon a mere *prima facie* showing in disregard of defenses. Other charges stating the theory of the action, the burden of proof, and the requirement that less than all of the facts pleaded by the plaintiff would not support a recovery were given, and, when considered, in connection with that to which exception is taken, presented the question fairly that upon the whole case a preponderance of the evidence must be found in favor of the material facts of the complaint before a verdict for the plaintiff could stand. There is much force in the appellee's suggestion that the answers did not present an affirmative defense, and that, therefore, the construction of the charge, as made by appellant, was authorized.

In addition to the general denial, the appellant answered simply that the appellee knew, before going upon the tramway, of the defects complained of. This was but the negative of the appellee's allegation that he did not know of such defects, and when the affirmative was established by a preponderance of all of the evidence, the negative necessarily failed.

The tenth charge was that "Where an employe has used ordinary care to ascertain the dangers of the place in which he works, and because of some condition of things he could not discover the danger, and if he is then injured by reason of some unknown danger that he did not discover and could not discover by the use of ordinary care, he would not be in fault himself."

The objection urged to this charge is that it states a condition upon which a recovery may be had, omitting

the question of the master's fault or whether the injury may have been the result of unavoidable accident, and overlooking the element of contributory negligence. We think it manifest that appellant has not properly construed the charge. It does not purport to state a condition permitting recovery. When read in connection with the other charges given, this charge is without objection, in acquitting the servant of fault, in going upon dangers which, by the use of ordinary care, could not be discovered. The conditions of recovery, including the element of contributory negligence, were well charged in other instructions given, and the jury could not have been misled by the charge complained of.

The thirteenth charge told the jury that: "In cases where an employe is required to work among latent or hidden dangers known to the employer, but unknown to the employe, it would be the legal duty of the employer, having knowledge of such hidden dangers, to disclose them to the employe."

Appellant's counsel says of the charge that: "It makes it the duty of the employer to notify the employe of hidden dangers known to him, although the dangers may be such as the employe has assumed under his contract of employment."

Implied assumptions of risks are only such as are naturally incident to the service and those which are known or which ordinary care would discover and which are disregarded by the servant. Those dangers which are unknown to the servant, and not discoverable by him with ordinary care, but which are, or by ordinary care of the master should be, known to him, are not assumed. Of such the master is in duty bound to notify his servant and this at the peril of answering in damages.

Mr. Beach, in his work on contributory negligence, section 359, says of this rule: "It is the theory of the

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decisions that the servant takes the risk only of what may be denominated 'seen dangers,' but by this is understood nothing more than that a servant is entitled, when there is any danger connected with the machinery or employment in which he is engaged and which ordinary inspection and carefulness on his part will not enable him to avoid, to have it distinctly announced to him. It is meant that, as to such danger, it is particularly the duty of the employer to warn him. He is plainly entitled to have them pointed out when he enters upon the service. When this is done in good faith they become a part of his contract, but, for any failure in this regard, when injury ensues, the master is liable."

Many cases are cited to support the text and the principles announced have been frequently adopted in this State. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Louisville, etc., R. W. Co. v. Wright, supra*, and cases there cited.

The hidden danger of which the charge speaks, when applied to the theory of the present case, could not be supposed to include those dangers naturally and necessarily incident to the service.

The fifth and ninth charges given and here questioned, embody substantially the propositions above stated as to the assumed risks and the duty of the master to give notice of those not assumed when hiring the servant.

Appellant objects specially to the requirement stated, that the master shall give notice to "the servant of such danger when hiring him," and contends that it is sufficient if notice be given before injury. The language is probably not the most careful, nor the best, as expressive of the proposition intended by the charge, but this may be excused from the fact that it was copied from the language of this court in *Louisville, etc., R. W. Co. v. Wright, supra*, p. 388.

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It is manifest that the phrase was not employed as intending to direct the notice to the time of the contract of employment, but to the time when the service was required. However, as there was no pretense of notice by the appellant to the appellee, it can not be claimed that harm resulted from the charge.

The action of the court in refusing three instructions asked by the appellant upon the subject of assumed risks and contributory negligence, is complained of. The instructions were, in themselves, unobjectionable, but the same propositions stated in them were fully covered by charges given, and there was no error in the refusal.

Finally, counsel discuss the sufficiency of the evidence, and we have carefully read the entire record of the evidence with a view to passing upon this question. We can not pass upon conflicts in evidence, and when we are required to pass upon the sufficiency of the evidence, it must be understood that we but consider all of that which is favorable to the verdict or finding of the lower court. In this case, there was evidence which, if not controverted, in our opinion, sustained the verdict. The principal contention, upon this branch of the case, by the appellant, is the appellee's failure to look for approaching carriages before leaving the dormer when, as urged, he could have done so. The weakness of this position is in the fact that at the point of leaving the dormer, the appellee stepped upon a board walk made for that use, which, but for the projections from the carriage, would have been safe.

If, therefore, he had no knowledge which would suggest that he should look for dangerous projections over an otherwise safe walk, he would not have been negligent in going upon the walk without looking. It would not require of him the same care as if he had been obliged to go upon the track where the heavy and dan-

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gerous machinery was moving frequently. The walk at the side of the track was an invitation to go upon it, and was an assurance,—coupled with the appellant's duty to make it safe, or give notice of its dangers,—that it was safe. Whether the appellee knew, or might by the exercise of ordinary care and prudence, have known of the dangerous projections is involved in conflict upon the evidence, and there being evidence that from beneath the tramway, where appellee had worked, the projections could not be seen, that view we must accept. As to whether the opportunities of the occasion of appellee's first going over the tramway and returning through the dormer were sufficient to advise him of the projections from the carriage, by which he was injured, is a matter about which there might be reasonable differences of opinion, and the jury having construed the evidence and adopted that favorable to the appellee, we are not permitted to disturb it.

We find no error for which the judgment of the circuit court should be reversed, and it is therefore affirmed.

Filed Oct. 18, 1894.

No. 16,918.

139	151
145	608

HUFFORD ET AL. v. CONOVER.

COUNTY COMMISSIONERS.—*Dismissal of County School Superintendent.*—*Jurisdiction at Special Term.*—The board of county commissioners has jurisdiction to hear and determine a petition for the dismissal of a county superintendent of schools for immoral conduct and neglect of duty, at a special session of such board. *City of Vincennes v. Windman*, 72 Ind. 218, distinguished.

From the Rush Circuit Court.

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G. H. Punttenney, H. E. Barrett, D. S. Morgan and D. Morris, for appellants.

B. L. Smith, C. Cambern, W. A. Cullen and J. D. Megee, for appellee.

HOWARD, J.—The appellee was the county superintendent of schools of Rush county, and the appellants, as citizens of the county, filed their petition with the auditor on the 20th day of September, 1892, charging the appellee with being guilty of certain immoral conduct, and neglect of duty while in the discharge of his duties as such school superintendent, and praying the board of county commissioners that he be removed from office, and the said office be declared vacant.

The auditor thereupon issued a summons to appellee, notifying him of the charges against him, and the names of those preferring the charges, and requiring him to appear at the county auditor's office in Rushville on the 1st day of October, 1892, to answer said charges.

On the 1st day of October, 1892, the appellee made a special appearance before the county commissioners, and filed his motion to dismiss the action, and to abate the proceedings, for the reason that the board had no jurisdiction of the person of the appellee or of the subject-matter of the action, at a special session, setting out at length appellee's reasons and objections against the jurisdiction of the commissioners' court at such special session.

The motion to dismiss was overruled, as was also a demurrer to the complaint filed by appellee, likewise a motion to make more specific. The appellee then filed a motion and affidavit for continuance, which was granted, and the cause was continued until October 7, 1892.

On the 7th day of October, 1892, the parties appeared

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in person and by counsel; and the record recites: "This cause is now submitted to the board of commissioners for hearing and determination upon the petition heretofore filed herein. The evidence is heard, and the board being well advised in the premises find for the petitioners that the facts contained in the petition are true, and the said Robert F. Conover, defendant herein, should be removed and dismissed as county superintendent of Rush county, Indiana, for immorality, as alleged in the petition, and that said office should be declared vacant."

Judgment was entered accordingly, and the appellee was removed from office, and judgment for cost was entered against him. On appeal to the circuit court, the motion of the appellee, filed before the commissioners to dismiss the action for want of jurisdiction, was made a part of the record by special order of court. This motion having been submitted to the court, was, after due consideration, sustained, and the cause was dismissed. This action of the court is claimed by appellants to have been erroneous.

There is but one question for our decision: Did the board of county commissioners have jurisdiction to hear and determine this cause at a special session of the board?

By section 7822, R. S. 1894 (section 5737, R. S. 1881), it is provided that the county auditor, and in case of his disqualification the other officers named, may call special sessions of the boards of county commissioners whenever the public interests require it. Under the provisions of this and the following sections, it has frequently been held that the county auditor has power to determine when the public interests require that the board be convened in special session, that his action in calling such session, and determining the notice that shall be given therefor, can not be called in question, and that the board, when so convened, may transact

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any business over which it has jurisdiction. *Oliver v. Keightley*, 24 Ind. 514; *Jussen v. Board, etc.*, 95 Ind. 567; *White v. Fleming*, 114 Ind. 560.

By section 5900, R. S. 1894 (section 4424, R. S. 1881), it is provided, amongst other things: "That the board of county commissioners shall have power to dismiss any county superintendent for immorality, incompetency, or general neglect of duty, or for acting as agent for the sale of any text-book, school furniture, or maps; but no county superintendent shall be dismissed without giving him written notice, under the hand and seal of the auditor, ten days before the first day of the term of the court of commissioners at which the cause is to be heard; and the said notice shall state the charges preferred against the superintendent, the character of the instrument in which they are preferred (whether a petition, complaint, or other writing), and the names of those preferring the same."

From the foregoing provisions of the statute it appears that the board of county commissioners have been given jurisdiction of the subject-matter of this action, the dismissal of a county school superintendent for immorality or other offenses named. From the record it appears that the appellee received the written notice prescribed in the same statute. It would seem, therefore, that in this case the board had jurisdiction, both of the subject-matter and of the person of the official charged with misconduct.

Counsel for appellee, however, contend that such jurisdiction could only be acquired at a regular term of the board and not at a special term, as in this case.

In this contention counsel rely upon the case of *City of Vincennes v. Windman*, 72 Ind. 218. In that case it was held by this court, that a board of county commissioners, convened in special session, can not make a

valid order for the annexation of contiguous territory to an incorporated city.

The statute for the annexation of contiguous territory to incorporated cities, sections 3659, 3660, R. S. 1894, (sections 3196, 3197, R. S. 1881), requires a general notice, by publication, to all persons interested, to be given for thirty days by the common council, stating that the petition for such annexation will be presented to the county board.

That statute does not, in express terms, require that the petition for annexation shall be presented at a regular session, nor does it require that the notice shall refer to a regular term; but the court, in the case of *City of Vincennes v. Windman, supra*, was of opinion "that the intention of the Legislature, as evidenced by the general language and spirit of the act, was, that the petition and notice should be addressed to, and acted upon, at a regular session of the board."

"Of the regular terms," said the court, "held at the times fixed by a public law, all citizens may well be held bound to take notice, but they ought not to be held to take notice of a special session called, upon brief notice, by the county auditor, * * * and it can not be affirmed, with any fair show of reason, that the Legislature meant that the petition requiring thirty days' notice should be acted upon at a session which might be called upon six days' notice."

The six days' notice here spoken of is the notice to the members of the board themselves, and not to any parties who may appear before them. *White v. Fleming, supra*.

The thirty days' notice is by publication, and is to the public at large who may be interested in the annexation proceedings.

It does not seem clear that the reasoning of the court in that case is applicable to a statute, such as we are

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considering, where a written personal notice to an officer charged with violation of his duties is prescribed, to be given "under the hand and seal of the auditor, ten days before the first day of the term of the court of commissioners at which the cause is to be heard."

In *City of Vincennes v. Windman*, *supra*, the court arrived at the intention of the Legislature, "as evidenced by the general language and spirit of the act."

Taking the same means of arriving at the intention of the Legislature in the act providing for the dismissal of immoral, or otherwise unfit, school superintendents, we can not believe that the Legislature intended that a school officer charged with such gross offenses against lady teachers in our public schools, as are charged in this case, should have from two to three months in which he might proceed in his ruinous work, until a regular session of the board should come around and he might finally be dismissed. The ten days' written personal notice would seem rather to indicate that the Legislature had in mind more summary measures for ridding the schools of so unfit an officer.

If innocent, too, the time is long enough to enable him to prepare for his vindication. It is the same notice given to one brought into the circuit or other trial court, whether at a regular or a special term, to answer a charge affecting the dearest interests of person or property. And, in a proper case, he may have continuance of the trial, as was had in this case.

It is true, as said in *City of Vincennes v. Windman*, *supra*, that "where a term, or session, of a court or board is spoken of, the natural and obvious inference is, that a regular term or regular session is meant."

But the court adds: "Of course, if the context assigned a different meaning to the terms, it would be otherwise."

In that case the context strengthened the inference that the Legislature meant the regular sessions fixed by law. In the case which we are considering, the context points to a speedy determination of the questions raised by the petition.

The education of our youth should be surrounded by the purest influences. It is not enough that the intellect be cultivated; it is even more necessary that the heart should be uncontaminated. It is particularly needful that teachers and school officers should be moral men and women, and that their example should be such as may tend to train their youthful charge to a love of virtue.

No cause has been nearer to the conscience of the people of this commonwealth, none has been more sacredly guarded by the law-making power, than the welfare of the common schools of the State, the nurseries of the coming generation. We can not believe that the Legislature, in providing for the removal of an immoral school superintendent, did not intend that the county board should have power to remove him only at a regular term, four times a year; but we rather believe that the legislative intent was that, if guilty, he should be removed in ten days, but if innocent, that such a charge should not hang over him for months, to his own humiliation and the detriment of the schools under his care; that whether innocent or guilty, the matter should be determined as soon as reasonable time is had for a fair trial of the matters charged.

The statute providing for the removal of a school superintendent, like that for annexation of territory to a city, is a special statute, and, like it, does not expressly state whether the proceedings shall be had at a regular or a special session of the county board.

The only reference to the session made in the statute

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is in connection with the notice to the accused, which it is required shall be given "ten days before the first day of the term of the court of commissioners at which the cause is to be heard."

From this definite personal notice, from the context, and particularly from what has been said of the general purpose and spirit of the statute, we think the term intended is the next ensuing regular or special term at which, after giving the prescribed notice, the cause can be heard.

The judgment is reversed, with directions to overrule the motion to dismiss the action, and for further proceedings.

Filed Oct. 9, 1894.

No. 17,018.

139 158
149 279
151 129

LAKE ERIE AND WESTERN RAILROAD COMPANY v. THE
STATE, EX REL. MUSHLITZ, TOWNSHIP TRUSTEE.

MANDAMUS.—*Alternative Writ, Insufficiency of.—Demand.—Public Ditch, Obstruction of.—Railroad.—Township Trustee.*—In a mandamus proceeding by a township trustee against a railroad company, to compel the removal of an obstruction from a public ditch, the alternative writ is insufficient on demurrer where it is not made to appear that the plaintiff had demanded of the defendant that the obstruction be removed.

From the Clinton Circuit Court.

W. E. Hackedorn, S. O. Bayless and C. G. Guenther,
for appellant.

T. H. Palmer, W. F. Palmer and A. G. Smith, Attor-
ney-General, for appellee.

HACKNEY, C. J.—The appellee prosecuted this suit in

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the circuit court to enforce, by the writ of mandamus, the removal of an obstruction from a public ditch within the civil township of which the relator was trustee. The alternative writ, upon which the issues were formed, set forth the facts related in the petition, and one of the assigned errors of the lower court is in the overruling of appellant's demurrer to said writ. The obstruction complained of consisted in maintaining across the appellant's right of way, in the line of said ditch, a large iron sewer-pipe for the passage, through said right of way, of the water flowing through said public ditch, said pipe having been laid above the level of the bed of said ditch as originally constructed, and because of which, the waters of said ditch were held back upon adjacent lands to the injury of a public highway, and of the public health. Several questions have been ably discussed by counsel, but our conclusion renders it unnecessary for us to consider more than the one question of said ruling upon demurrer. One objection to the writ, and that which we regard as fatal, is that it was not made to appear that the appellee had demanded of the appellant that said obstruction be removed. That a demand is necessary we regard as firmly settled in this State. *Lewis v. Henley*, 2 Ind. 332; *Condit v. Board, etc.*, 25 Ind. 422; *State, ex rel., v. Board, etc.*, 45 Ind. 501; *Board, etc., v. State, ex rel.*, 61 Ind. 379; *State, ex rel., v. Slick*, 86 Ind. 501. See, also, *People, ex rel., v. Walker*, 9 Mich. 328; *Coit v. Elliott*, 28 Ark. 294; *State v. Davis*, 17 Minn. 429; *State v. Schaack*, 28 Minn. 358; *Kemerer v. State*, 7 Neb. 130; *State v. Governor*, 25 N. J. L. 331; *State v. Lehre*, 7 Rich. (Law) 234.

We are aware that there are cases in other states where this view is not maintained, but we are of opinion that in no case should an officer, a corporation, or a citizen be visited with the extraordinary remedy of the writ with-

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out notice that his neglect is injurious to others who are demanding that it shall cease, and until an opportunity has made it possible for him to act upon such notice; nor should the courts be asked to extend this unusual remedy to enforce relief which may be obtained from the offender by the asking. This rule promotes the repose of society, and discourages litigation. There may be instances in which we would not hold a demand necessary, as where the defendant is shown to have done that which anticipates the demand, and refuses to be governed by it; but where such facts do not appear the demand is essential to give the relator that standing before the court, which entitles him to say not only that a denial of the writ would be a failure of justice because no other adequate legal remedy exists, but that he has done that which renders a resort to the writ indispensable, and entitles him, as one who has acted justly, to seek that extraordinary relief. As said in *State, ex rel., v. Board, etc., supra*: "In order to lay the foundation for issuing the writ, there must have been a refusal to do that which it is the object of the writ to enforce, either in direct terms, or by circumstances distinctly showing an intention in the party not to do the act."

Counsel for the appellee urge with strong argument that a distinction exists in those cases where the duty neglected is an official duty, and where the duty is not charged upon one acting in an official capacity.

We concede that in some instances greater reason exists for requiring the demand that an official shall perform a duty resting upon him, before resorting to the writ, than in cases where a duty rests upon one not an official. Those are instances such as counsel illustrate, where the official is charged with a duty the discharge of which depends upon a demand by him for whom the

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duty is to be performed. How could the clerk of the circuit court be required, by the writ, to issue a marriage license to one who had not sought the license from the clerk before applying for the writ? No one would insist that, in such case, the writ should issue. The fact that the rule applies with greater reason in the one case, does not require the withholding of the rule in other cases.

The appellee quotes the following statement of the rule from 14 Am. and Eng. Encyc. of Law, 106: "The general rule is admitted to be that a demand and refusal is necessary. * * * But it is manifest that there are cases affecting public officers or duties when the idea of a literal demand and refusal does not have place, * * * and especially is this true when the respondent has done an act which he calls a performance, but which the law says is not such."

This statement of the rule supports our view of the present case, but how far it may be a departure from the general rule as we have stated it, if it can be said not to support it, is not now a question.

We do not consider whether the writ may be employed to abate a nuisance, nor do we determine the sufficiency of the writ to disclose the appellee's inability to remove the obstruction through the instrumentalities provided by law. Nor do we determine whether the criminal prosecution provided by law for obstructing public ditches, will supersede the remedy by mandamus, as intimated in *State, ex rel., v. Yant*, 134 Ind. 121, but the following cases upon the subject may be consulted as probably holding that it is not so superseded: *Etheridge v. Hall*, 7 Port. 47; *In re Trustees of Williamsburgh*, 1 Barb. 34; *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711; *King v. Bank of England*, 2 Doug. 524; *Queen v.*

The City of Huntington v. Burke.

Eastern Counties R. W. Co., 10 Ad. & El. 531; *Dane v. Derby*, 89 Am. Dec. 722.

The judgment of the circuit court is reversed, with instructions to sustain appellant's demurrer to the alternative writ.

Filed Nov. 14, 1894.

No. 17,028.

THE CITY OF HUNTINGTON v. BURKE.

APPELLATE COURT.—*Jurisdiction.*—*Money Demand.*—*Transfer of Cause.*

—The jurisdiction on appeal of a money demand for less than \$3,500, is in the Appellate Court, and where, by mistake of the clerk, the case is docketed in the Supreme Court, the cause will be transferred to the proper court.

From the Wabash Circuit Court.

J. B. Kenner, U. S. Lesh and M. L. Spencer, for appellant.

C. W. Watkins, Z. T. Dungan and B. F. Ibach, for appellee.

MCCABE, J.—This was a suit commenced in the Huntington Circuit Court by the appellee, to recover damages against the appellant for alleged injuries sustained by appellee on account of the alleged negligence of the appellant, the amount demanded in the complaint being for less than \$3,500. The court overruled a demurrer to the evidence and rendered judgment in favor of the appellee for \$850. The appellant prayed an appeal to the Appellate Court, which was granted. The clerk, by mistake, has docketed the appeal in this court.

The statute provides that "In any case wherein an appeal has been taken from a lower court to the Appellate

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Court, and the same should have been taken to the Supreme Court, it shall be the duty of the Appellate Court, on its own motion, to cause such case to be transferred to the Supreme Court, and in any cause where an appeal has been taken to the Supreme Court when it should have been to the Appellate Court, it shall be the duty of the Supreme Court, of its own motion, to cause such case to be transferred to the Appellate Court, and the action of such court in making such transfer shall be final." 1 Burns R. S. 1894, section 1362; Acts of 1893, p. 31, section 3.

While this case does not fall within the exact letter of the statute quoted, it falls within the spirit and intent of the act. The cause is therefore transferred to the Appellate Court, the amount in controversy being less than \$3,500, and the action being for the recovery of a money judgment only, the Appellate Court has the exclusive jurisdiction of the appeal. 1 Burns R. S. 1894, section 1336; Acts 1893, p. 29, section 1.

Filed Nov. 14, 1894.

No. 17,086.

SHAUL v. RINKER ET AL.

PROCESS.—Summons.—When Necessary to Issue.—Cross-Complaint.—Jurisdiction.—Where a cross-complaint is filed, setting up a cause of action not disclosed in the original complaint, it is necessary to issue process thereon against the defendants therein named, in order to acquire jurisdiction over their persons.

From the Madison Circuit Court.

H. D. Thompson, J. T. Ellis and E. E. Hendee, for appellant.

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COFFEY, J.—On the 7th day of September, 1891, the appellee Flora Rinker commenced an action in the Madison Circuit Court, against her coappellees, Minnie Huston, Clarence Huston, Frank Huston, Blanche Huston, the appellant Laura Shaul, and others, for the partition of a tract of land described in her complaint in that cause. She alleged in her complaint, among other things, that she and Clarence Huston, Frank Huston, Minnie Huston and Blanche Huston were the owners in fee and tenants in common of the undivided two-thirds of the land, and that some one of the other defendants, but which one she was unable to state, was the owner in fee of the remaining one-third.

The appellees, Minnie Huston, Clarence Huston, Frank Huston, and Blanche Huston were defaulted, but being minors, under the age of twenty-one years, a guardian *ad litem* was appointed for them, who filed an answer.

The appellant, Laura Shaul, filed a cross-complaint against the plaintiffs in that action, Minnie Huston, Clarence Huston, Frank Huston, Blanche Huston, and others, in which she alleged, among other things, that she became the owner in fee of all the land described by deed of conveyance executed by Lucy A. Huston on the 16th day of February, 1878; that said Lucy A. Huston put her in possession and that she continued to own and possess the same, paying all taxes and assessments thereon, until she sold and conveyed the same, by general warranty deed, to William P. Harter, and that the appellees herein were asserting an unfounded claim to the land, which cast a cloud upon the title. Prayer that the title be quieted in Harter.

No process was ever issued on this cross-complaint, but without such process, the court appointed a guardian *ad litem* for the appellees and proceeded to try the

cause, rendering a decree on the cross-complaint quieting title in Harter.

The complaint in this cause alleges that the finding and judgment in favor of Laura Shaul was procured by fraud upon the court in this; that her attorneys represented to the court that the cause, both as to the complaint and cross-complaint, had been compromised and adjusted, and that, by agreement, Harter was to have a finding and judgment quieting his title; that said finding and judgment were made and rendered by the court without any notice to the defendants to said cross-complaint, and that the court had no jurisdiction of the persons of said defendants, and that the finding and judgment are without jurisdiction and void.

The court overruled a demurrer to this complaint, and the appellant excepted. Thereupon she filed an answer, averring that the decree which the appellees were seeking to set aside was rendered by agreement; that by the terms of said agreement the appellant agreed to pay to the clerk of the Madison Circuit Court, for the use of the appellees, the sum of five hundred and ninety dollars, and to surrender for cancellation a tax certificate which she held against the land in controversy of the value of eighty dollars; that said decree was rendered pursuant to said agreement, and that she thereupon paid said sum of money to the clerk and surrendered said certificate for cancellation; that after the decree was entered the appellees, with knowledge of its terms, accepted said money from the clerk and still retain the same, never having returned, or offered to return, the same.

To this answer the court sustained a demurrer, and the appellant excepted.

On final hearing the court set aside the decree in favor of Harter, from which action of the court this appeal is prosecuted.

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We are of the opinion that the circuit court did not err in overruling a demurrer to the complaint in this cause. The cross-complaint of Laura Shaul set up a new cause of action not disclosed in the original complaint, and it was, therefore, necessary to issue process thereon against the defendants therein named in order to acquire jurisdiction over their persons. Elliott's General Practice, and authorities cited, section 375.

The record discloses the fact that this was not done. For this reason the court had no jurisdiction as to these appellees, and the decree, as to them, was void.

We think the answer of Laura Shaul was wholly insufficient to bar the right of action set up in the complaint.


Section 2945, R. S. 1881, has no application to the case, inasmuch as the record disclosed the fact that the appellees were minors, under the age of twenty-one years. In dealing with them, with full knowledge that they were under legal disabilities and could not bind themselves by contract, she was bound to know that they might, at any time, rescind such attempted contract without restoring what they had received.

Nor does section 632, R. S. 1881, apply to the case, as this was an action to review a judgment and not an appeal to the Supreme Court.

Numerous motions were made by the appellant, after the finding and judgment entered by the court, having in view a modification of the decree entered in this case, but, as the questions presented by these motions are the same as those we have discussed, we deem it unnecessary to extend this opinion by setting them out.

There is no error in the record for which the judgment should be reversed, and the same is, therefore, affirmed.

Filed Nov. 16, 1894.



No. 16,854.

BEACH ET AL. v. BELL ET AL.

139	167
140	215
139	167
131	583

LIEN.—*On Lands of Decedent.*—*When May be Enforced After Final Settlement.*—*Contribution.*—Where a person holds a specific lien on real estate of a decedent, as for contribution for money paid by a co-surety, he can either file his claim therefor against the decedent's estate, or he may enforce such lien against the land after final settlement of the estate, for liens continue against real estate unless discharged by decree or payment.

From the Vigo Superior Court.

B. V. Marshall, J. Jump, J. E. Lamb and J. C. Davis,
for appellant.

R. B. Stimson, S. C. Stimson, A. M. Higgins and F. A. McNutt, for appellees.

HACKNEY, J.—In 1882 a judgment was obtained in the lower court against one Rogers, as principal, and the appellees, or those whom they represent, and others, including Ebenezer C. Edmunds; as sureties. In 1885 the appellees paid said judgment upon execution, and the sums paid by them severally were entered as credits upon the docket of said judgment. In 1890 said Edmunds died intestate at the county of Vigo seized of certain real estate in said county, and upon administration said real estate was sold to the appellant, Harriet G. Beach, by order of court and for the payment of the debts of the estate of said Edmunds. The appellees were not parties to the proceedings for the sale of said real estate, and they filed no claims against said estate for contribution, but relying upon a supposed lien upon said real estate, in their behalf, for the sum which said Edmunds should have contributed to the payment of said judgment, the appellees instituted this suit, after the settlement of the estate of said Edmunds, and claimed a lien upon said

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real estate for the sum claimed, as a contribution from Edmunds.

In the lower court a demurrer to the complaint was overruled, and the appellants declining to plead further there was a finding and decree in favor of the appellees. In this court the only error assigned is in said ruling on the complaint.

The appellants contend that the failure of the appellees to file their claim against the estate of Edmunds resulted in a loss of all remedy, and they cite, as supporting them, sections 2465, 2466, 2467, 2468 and 2469, R. S. 1894 (Elliott's Supp. 385; R. S. 1881, sections 2311, 2312, 2313 and 2314). These sections forbid that actions may be brought by complaint and summons against an estate, and require that a succinct statement of any claim shall be verified and filed, and "if the claim be secured by a lien * * * such lien shall be particularly set forth in such statement, and a reference given" to the record of the lien; "if not filed at least thirty days before final settlement of the estate, it shall be barred." If the claim is upon any joint, or joint and several, contract, or upon any joint judgment founded thereon, the same may be enforced against the estate only by filing the claim in the manner above indicated, and every such claim shall, as to such estate, be deemed joint and several. If the decedent is a surety in any such contract, or in a judgment thereon, the estate shall not be liable unless it be shown that the principal is a nonresident or is insolvent. And if the decedent is a co-surety in any such contract or judgment, the estate shall only be liable for the proportional part of the debt according to the number of solvent resident sureties.

If these provisions are construed to require any such claim as may be secured by lien to be filed, and to participate in the personal assets of the estate, or that not

only the right to participate in such assets is barred, but that the lien also is lost, we observe no escape from the conclusions that the appellees had no cause of action.

The appellees argue that these provisions must be considered in connection with section 387, Elliott's Supp., 2484, R. S. 1894, denying the right to foreclose liens upon the realty of a decedent during the year of administration, with section 2338, R. S. 1881, 2491, R. S. 1894, directing administrator's proceeding to sell real estate to pay debts of the estates, to examine the records for liens and to make lienholders parties to such proceedings, and with section 2350, R. S. 1881, 2505, R. S. 1894, requiring the court to order such sales to be made either freed from liens or subject to liens.

We have no doubt that such construction should be given to all of the provisions of the statute as to avoid inconsistency and create a complete and harmonious system of procedure with reference to claims against decedents' estates, both where such claims are secured by liens upon real estate and where they are not so secured. Under all of the provisions cited, there is every reason for holding that a mortgage lien must be filed within the year of administration, or that a judgment lien shall be so filed or be barred, as there is for holding that the lien in this case should have been so filed. If the claim which is secured by the lien is to participate in the personal assets of the estate, there is little room for doubt that it must be filed against the estate before settlement, or be barred, but we find no good purpose nor expressed or implied intention, in any of the statutory provisions cited, to deprive one of his mortgage, judgment, or other lien on specific real estate where he does not care to pursue the personal assets of the estate and participate with general creditors.

Real estate does not go to the administrator, but is

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taken by the heirs or devisees subject to the payment of the debts of the estate only when the personalty is insufficient to pay such debts. The heirs or devisees do not take the property free from liens where the lienholder fails to file his claim against the estate, nor do they take it subject to any personal liability.

It has frequently been held that the purchaser of lands sold for the payment of the debts of a decedent takes them subject to liens. *Crum, Admr., v. Meeks*, 128 Ind. 360; *Massey v. Jerauld*, 101 Ind. 270; *Henderson v. Whiting*, 56 Ind. 131; *Boaz v. McChesney*, 53 Ind. 193.

This proposition is conceded by the appellants, but the effort is made to distinguish between it and the case in hand by indulging the presumption that in the cases cited the claims upon which the liens were based had been filed against the estate. This presumption is not warranted by the cases, and the distinction can not rest upon such presumption if warranted. The true solution of the question must rest upon a requirement that claims must be filed to participate in the personal assets, but that liens continue against real estate unless discharged by decree or payment.

There was, therefore, no error in the ruling of the lower court, and its judgment is affirmed.

Filed Nov. 21, 1894.

No. 16,971.

MCKINNEY ET AL. v. LANNING ET AL.

REAL ESTATE.—*Title by Adverse Possession.*—*Twenty Years' Statute of Limitation.*—Twenty years of adverse possession of land under claim of ownership in fee confers as complete a title as a written conveyance.

SAME.—*Easement.*—*Extinguishment.*—*Adverse Possession.*—*Revivor of Easement.*—*Conveyance.*—*Deed.*—Where A conveyed a strip of land

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off his lot to B, adjoining B's lot, to be used as a driveway, reserving to himself, his heirs and grantees an easement in said way for driving, etc., and B and his grantees have continuously, for more than twenty years, claimed the ownership in fee thereof, and for such time held exclusive and adverse possession thereof, denying the enjoyment of the easement, the easement, having been extinguished by adverse possession, can not be revived by a grantee of B by a reference to the reservation in A's deed to B.

SAME.—Conveyance.—Deed, Recitals in.—Estoppel Only as Between Parties or Privies to Conveyance.—The reference to the reservation in A's deed by a subsequent conveyance by one of B's grantees, can not be set up as an estoppel by the grantees of A, they not being parties or privies to the conveyance; for no one can set up another's act or declaration as a ground of estoppel, unless he has himself been misled or deceived by such act or declaration.

SAME.—Possessory Action.—Title.—Recovery.—One must recover, if at all, on the strength of his own title, and not on the weakness of his adversary's.

From the Washington Circuit Court.

H. Morris, J. A. Zaring and M. B. Hottel, for appellants.

D. M. Alsbaugh and J. C. Lawler, for appellees.

DAILEY, J.—The complaint in this action is in three paragraphs.

The first is in the usual form for an action in ejectment.

The second, also, seeks to recover the land in dispute and to quiet the plaintiffs' title thereto and to recover damages for its detention. It sets out the facts fully, and alleges that the ground in controversy was conveyed to defendants' grantors for a special purpose, and that there was an easement or right to use and enjoy the land for certain privileges reserved to the original grantor, who was then the owner of the lands described in this paragraph, and which easement or right to use attached to the real estate of which the land in controversy was then a part, and that it was an easement running with the land; that the plaintiffs are the owners of the land, as

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well as the easement in dispute, and the defendants, by reason of having failed to use said strip of ground for the purposes for which it was conveyed to their grantors, and having failed and refused to permit plaintiffs to enjoy their easement in the same, have forfeited their right thereto, and it has reverted to plaintiffs. They seek possession and ask to have their title quieted.

The third paragraph simply asks to have plaintiffs' title quieted in and to the easement, and the right to use and enjoy it, together with the right to recover damages for having been kept out of it in the past. To each of these paragraphs the defendants filed answers in three paragraphs, the first being the general denial; the second setting up the fifteen year, and the third the twenty year, statute of limitations. The plaintiffs replied by the general denial. The defendants then filed a cross-complaint in which they alleged ownership of the land in controversy, and asked to have their title thereto quieted, and set at rest as against the plaintiffs. A demurrer was overruled to the cross-complaint, and the plaintiffs then answered in general denial. The cause was tried by the court, resulting in a special finding for the defendants on their answers and cross-complaint. The plaintiffs filed a motion for a *venire de novo*, which was overruled, as was also a motion for judgment in their favor on the special finding of facts, and a motion for a new trial. Plaintiffs duly excepted to the court's conclusions of law on the special finding of facts, and judgment was rendered for the defendants. The appellants assign as error:

1. That the court erred in its conclusions of law.
2. The court erred in overruling plaintiffs' motion for a *venire de novo*.
3. The court erred in overruling plaintiffs' motion for judgment on the special finding.

The facts specially found by the court are, in sub-

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stance, as follows: In the year 1843, David T. Weir owned lot number 64, in Salem, Washington county, Indiana, and occupied it as his family residence. James Rodman at that time owned lot 63 in said town, which adjoined the first described lot on the east side thereof, said lots fronting on East Market street, and running north to an alley. Both lots were then under one enclosure by a post and board fence. On the 25th day of August, 1843, said Rodman, his wife joining, executed a deed conveying to said Weir a strip 12 feet in width off the west side of lot 63, in consideration of \$33.-33½, which was duly recorded on January 8, 1844, in the recorder's office of said county. It, however, stipulated that the strip was to be used as a passage with a gate in front, and the grantor reserved the privilege for himself, his heirs and grantees, to drive a horse, carriage, cow and other stock over it whenever necessary for him to do so, but for no other purpose. Soon after the date of the deed, said Weir took possession of the premises so conveyed, erected buildings, set out fruit trees, grape vines and the like thereon, and constructed a brick pavement in front of the same, and with his family continued to so use said strip until his death, which occurred on the 4th day of March, 1846. Said Weir died intestate, leaving his widow and Merrill A. Weir, and other children named, as his only heirs at law. The widow and children occupied lot 64 and the 12-foot strip in dispute from the date of David T. Weir's death until they sold and conveyed the same to Merrill A. Weir, on the 30th day of April, 1880. The grantee took possession through his tenant, and kept possession until he conveyed the same to the defendants, who were trustees of the Methodist Episcopal church, on the 22d day of March, 1886. It was, however, expressed in this deed that the 12-foot strip was conveyed subject to the stipula-

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tions and conditions of the said deed of August 25, 1843. After the death of David T. Weir, the widow and children, while in possession of said strip, built a board fence on the east line thereof, and separated it from the remainder of lot 63, and enclosed said strip and lot 64 under one fence, which has so remained from that time until the commencement of this suit. While said David T. Weir lived he claimed to own the fee simple title to said strip, from the date of his said deed until his death, and thereafter his widow and children claimed to so own it until they conveyed it to Merrill A. Weir, who so claimed to own it until he conveyed it to the defendants. Said strip was in the possession of said Merrill, and those under whom he claimed from the year 1843, to the year 1891, inclusive, under claim of ownership, and such possession was during all that time, actual, peaceable, open, notorious, continuous, uninterrupted and exclusive.

Said James Rodman died testate in 1854, and by his last will and testament, which was duly probated, devised to his son, Thomas J. Rodman, said lot 63, but by mistake described it therein as lot number 62 in said town. Said grantee, by his tenant, took possession of all that part of lot 63, lying east of the fence built by David T. Weir's widow in 1846, and by his tenants held possession until 1870, when he died intestate, leaving a widow and certain named children who were his only heirs at law.

On the 10th day of December, 1880, said widow and children executed a deed conveying to Addie E. Butler said lot 63, which deed was duly recorded in the recorder's office of said county on the 29th day of April, 1881.

On the 26th day of June, 1889, said Butler and her husband conveyed said lot 63 to John D. McKinney, one of the plaintiffs herein, and the deed was duly recorded on the 16th day of July, 1889.

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On the 29th day of June, 1889, said McKinney and wife conveyed said lot to his coplaintiff, Rachel McGinley for and during her natural life. The taxes on said lot 63 were assessed in the name of James Rodman from 1843 to 1858, and from that time until 1864 in the name of his estate. From the date last named they were assessed on the east part of said lot only in the name of Thomas J. Rodman until 1870, and subsequently until 1884, to his estate. From 1884 to 1890 all of said lot was assessed to Addie E. Butler, and in 1890 to said McGinley. From 1843 until Merrill A. Weir conveyed the 12-foot strip to said trustees, it was assessed in the name of David T. Weir until he died, then against his heirs until they conveyed to Merrill A. Weir, and then in the name of the latter until he conveyed to said trustees.

On or about the 3d day of May, 1881, Addie E. Butler, by her agent and husband, demanded of Merrill A. Weir the possession of said strip, and that the same be opened as a way, but her demands were refused, and before the commencement of this suit the plaintiffs made demand upon the defendants that it be opened, but they refused to comply therewith.

It is found that when said Butler purchased lot 63, she knew the strip was in the possession of Merrill A. Weir, who claimed to own it in fee, and the plaintiffs had notice that defendants were in the possession and claiming ownership of said strip when they purchased it of said Butler.

In the case at bar the evidence is not in the record, and this court can only look to the special findings for the facts. They show conclusively that the answer of the twenty year statute of limitation was proven, and it is the settled law of this State that twenty years' adverse possession confers as complete a title as a written con-

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veyance. *Bowen v. Preston*, 48 Ind. 367; *Booker v. Tarwater*, 138 Ind. 385.

It seems quite clear upon reason that the right of Rodman to the use of the twelve feet in dispute can not be revived by the deed of Merrill A. Weir to the appellees. It is shown by the special finding of facts that at the time the appellants purchased from Mrs. Butler, the grantor of the appellees was in possession of the premises, claiming to be the owner thereof, and that he and his grantors, direct and remote, had so held and exercised such ownership since the year 1843, a period of 38 years; and that when the deed to Mrs. Butler, and the one by her to the appellants were made, each grantee had knowledge of the fact that the appellees and their grantors were in possession and claiming seizin of the twelve feet in controversy.

It is urged by the appellants' counsel that the deed from Rodman to Weir only granted an "easement" or servitude in the strip, and that it was forfeited by reason of the grantee's failure to put a gate in front thereof for use as a passage way. We think this contention of the learned counsel is not supported by the findings, which show that the grantee took a fee subject to the right of user for certain specified purposes.

It is also argued that appellees ought not to have recovered below, because the deed to them from Merrill A. Weir refers to the deed of Rodman to David T. Weir, dated in 1843, and burdens the appellees with whatever it contained. It seems to us there is nothing in this contention. If the deed to the appellees were a quit-claim instrument, or, if no deed had been executed to them, but they were merely put in possession of the property, it would neither have strengthened nor weakened appellants' claim. As the appellants were not

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parties to the transfer to the appellees, the mere reference to the deed made in 1843 can not destroy the title acquired by more than twenty years' adverse possession.

It is insisted by counsel for the appellants, that both the grantor and the appellees are estopped by the deed executed by the former to them, in which reference is made to the Rodman deed.

If the appellants were either parties or privies to this conveyance, their position might seem tenable. But they were strangers to the transaction, and took the deed under which they claim, with their eyes wide open, and while Merrill A. Weir was occupying the ground, exercising dominion, and asserting ownership over it.

The rule is familiar that "an equitable estoppel never arises without proof that a wrong has been done or threatened on the one side and injury is supposed or reasonably apprehended on the other. This doctrine is elementary." *Barden v. Overmeyer*, 134 Ind. 660 (664).

In *Simpson v. Pearson, Admr.*, 31 Ind. 1, this court said: "But one who insists upon the acts of another as working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if that other is permitted to gainsay or deny the truth of what he did. For it is a well settled rule in such cases, that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration." *Cook v. Walling*, 117 Ind. 9; *Chaplin v. Baker*, 124 Ind. 385 (390).

In this case no misrepresentation is shown, no fraud is apparent. Merrill A. Weir said nothing and did no act to cause appellants to purchase this property. If the appellees were complaining of some acts of their grantor, they might well be cited to the deed under which they

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hold, as to his liability; but it does not come with any force for the appellants to urge in their own behalf that which might be insisted upon by Weir in a suit between him and the appellees.

Applying to this cause the well known rule of law that one must recover, if at all, on the strength of his own title, and not on the weakness of his adversaries', the appellants are not in a situation to complain of the judgment of the trial court confirming title in the appellees to the strip in litigation.

The judgment of the court below is affirmed.

Filed Nov. 15, 1894.

No. 16,792.

ADAMS v. SHEWALTER.

ACTION.—*Form of.*—*Remedy.*—*Code.*—*Equity.*—Under the code we have but one form of action, which embraces all that was formerly comprehended by actions at law and suits in equity, and there is a remedy if the case is such as would formerly have called for the interposition of a court of equity.

SAME.—*Partnership.*—*Equitable Relief.*—In courts of chancery a partner could sue his copartner and obtain an adjustment of the partnership affairs, and thus recover his whole interest therein.

SAME.—*Complaint.*—*Partnership.*—*Dissolution and Accounting.*—That the complaint is sufficient for a dissolution and accounting of a partnership, see opinion.

PARTNERSHIP.—*Legal Rights.*—*Contractual Rights.*—*Relief.*—A partner who is being defrauded has access to the courts for relief, notwithstanding contractual stipulations.

From the Randolph Circuit Court.

J. W. Headington, J. F. La Follette and D. T. Taylor,
for appellant.

J. J. M. La Follette, O. H. Adair, A. O. Marsh and J.
W. Thompson, for appellee.

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DAILEY, J.—This appeal was taken from a judgment rendered by the Randolph Circuit Court in a case originally begun by the appellee against the appellant in the Jay Circuit Court, asking for a dissolution of copartnership and an accounting.

The complaint was in one paragraph, with a copy of the agreement of copartnership filed as an exhibit.

There was a prayer for the appointment of a receiver, and, later on, an additional application for a receiver was filed.

The defendant demurred to the complaint, and the demurrer was overruled, to which he excepted.

Issues were then formed, and the cause was submitted to the court for trial on the 2d day of February, 1891, and, on the following 11th day of December, it made its finding for the plaintiff, and rendered a judgment against the defendant for \$9,116.56.

The first specification of error challenges the sufficiency of the complaint, upon the grounds that the complaint does not show a compliance by the plaintiff with all the conditions of the contract on his part; that there is no averment in the complaint that the appellee had served upon the appellant a written notice thirty days before the last six months of their copartnership, of his intention to withdraw from the partnership, as provided in the contract; that there is no averment in the complaint as to whether the business of the firm was carried on at a profit or a loss, nor as to the amount of money invested in the partnership business by the appellee, and that there is no allegation that the partnership debts were paid.

It appears, from the complaint, that the appellant and appellee entered into a written copartnership on the 14th of August, 1888, for the purpose of buying timber and manufacturing and selling staves and heading at Port-

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land, Indiana; that by virtue of said contract they engaged in business together, and continued therein since said time until the filing of the complaint, during which they manufactured and sold a large amount of material; that by the terms of the contract the plaintiff was to, and did, furnish all the money necessary to carry on said business, was to pay all bills and all debts owing by said partnership, and to be repaid for all sums so paid out, from the receipts of the concern; that said Adams was to have the one-half part of the profits of the business, to be paid him on settlements at such times and on such demand as was provided for in the contract; that all the advancements of money necessary to conduct the business, made by the plaintiff, was to be first repaid before the division and repayment of any profits; that the defendant had, however, drawn on his interest therein during the time the affairs had been conducted, to the amount of \$1,500; that in December, 1889, the firm had outstanding bills due them of about \$10,000, all of which could have been collected by simply drawing on the debtors; that said partnership is about to be dissolved and closed out, and the defendant is wholly insolvent; that on or about December 1, 1889, said defendant, secretly and without plaintiff's knowledge, went to Chicago and secured of the Creamer Package Manufacturing Co. settlement and payment in the sum of \$4,520 of the account of said firm, and refused and neglected to enter the payment on the books thereof, and concealed from the plaintiff the fact that he had collected the same; that the defendant, on the 4th day of December, 1889, wrote a letter to his partner stating that he was desirous of going to Minster, O., to transact some private business of his own, but he did not go there, and had no business at that place; that said letter was written fraudulently and deceitfully, and for the purpose of concealing

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from his partner his real design; that, instead of going to Ohio, he went to various places over the country where their debtors resided and collected of them sums of money specified in the complaint aggregating in amount \$7,520, all of which were owing to said firm, and there is due the plaintiff about \$8,000, for money advanced by him to carry on the business, that has not been paid, and to Shewalter Bros., for money paid out by them for said firm, the sum of about \$800, and other outstanding accounts, the amount of which is not exactly known to this plaintiff; that said defendant refuses to account for the money so collected and has refused to pay out of said money any debts of said firm, although orders and checks have been presented for payment, and declines to use said money for the benefit of the firm, or to pay any part thereof to this plaintiff; that said firm still owns timber in the yard and at their factory, to be cut, and it is to the interest of the firm to have it cut and sold; that the plaintiff has asked and demanded that a settlement and accounting be had between said parties, but the defendant refuses to pay over the money or to settle the partnership affairs; that all the acts of said Adams in collecting said money were done with the fraudulent intent and purpose of cheating and defrauding the plaintiff. Wherefore plaintiff demands judgment for ten thousand dollars, and an accounting, a settlement of said partnership, and dissolution of the firm.

There is a prayer for the appointment of a receiver to take charge of the assets and close up the business of the partnership, and for all other proper relief.

Appellant's entire attack upon the sufficiency of the complaint is predicated upon the theory that in its general scope and tenor, it is an action at law based on contract for the recovery of money, and not a suit in equity,

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and that it fails to state a cause of action for the reasons heretofore specified. It is true that, under the code, one partner can not sue his copartner to recover an indebtedness of the latter to the former growing out of the partnership transactions, until the affairs of the firm have been closed up, and its debts have been paid. But, in courts of chancery, a partner could sue his copartner and obtain an adjustment of his partnership affairs, and thus recover his whole interest therein. By the code we have but one form of action which embraces all that was formerly comprehended by actions at law and suits in equity, and there is a remedy if the case is such as would formerly have called for the interposition of a court of equity. *Briggs v. Daugherty*, 48 Ind. 247; *Douthit v. Douthit*, 133 Ind. 26.

In *Barnes v. Jones*, 91 Ind. 161 (167), it is laid down, "that not only willful acts of fraud and bad faith, but gross instances of carelessness and waste in the administration of the partnership, as well as the exclusion of the partners from their just share of the management, so as to prevent the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract by a court of equity. So also, it seems clear that a habit on the part of one partner of receiving moneys and not entering a receipt in the books, or not leaving the books open to inspection of the other partners, whether such conduct arise from a fraudulent intent or not, is good ground for a dissolution."

In *Kimble v. Seal*, 92 Ind. 276, it was held that when a partner, on demand, refuses to account with his copartner, a suit for dissolution and an accounting may be maintained, and the complaint need not aver either the amount put in or taken out by either party, these being incidental matters to be ascertained by the proof.

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So, in *Meredith v. Ewing*, 85 Ind. 410, it is said: "One partner may * * maintain an action to compel an accounting, and to recover such sum as may be found due him upon the final adjustment of the partnership affairs."

It is needless to cite authorities in support of the doctrine that the court is vested with the power to appoint a receiver on proper application, in this class of cases *pendente lite*. Applying these tests to the complaint under consideration, it was abundantly good for a dissolution and an accounting, and the demurrer was properly overruled.

It is contended that because the agreement of the parties provided that dissolution could only be had at the end of six months, and after thirty days' notice had been given, appellee would be remediless until he had complied with its terms.

Appellant loses sight of the fact that every partner not only has his rights as given him by contract, but those guaranteed by law, and if he is being defrauded, he has access to the courts for relief. It would be a strange condition of things, if a court of conscience would allow a partner, hopelessly insolvent, to loot a concern of \$7,000 or \$8,000 of its contents, and then barricade himself behind his own fraud, and take advantage of the wrong so perpetrated. Men's estates are not despoiled by courts of justice in this way. It is urged that as the complaint concludes with a demand for \$10,000, it is a complaint for a mere demand for money due, but it has been ruled otherwise, and the position is not tenable. *Miller v. Rapp*, 135 Ind. 614 (618). The contention that the court could not ascertain the amount due, can not be considered here, as the evidence is not in the record. It is urged by appellant that the court erred in sustaining the motion to strike out the second and third

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paragraphs of answer: In our opinion there was no available error in this ruling, as all pertinent facts pleaded in either paragraph could be proven under the first paragraph which was in general denial. *Robinson v. Snyder*, 74 Ind. 110; *Gheens v. Golden*, 90 Ind. 427.

The decision of the court below will have to be affirmed. The judgment is affirmed with costs.

Filed Nov. 13, 1894.

No. 16,903.

COLLINS ET AL. v. STANFIELD.

CONTRACT.—*Written.*—*Parol Verification.*—*Oral Agreements Performed Subsequent to Making Written Contract.*—*Subsequent Agreements.*—*Promissory Note.*—The rule that the terms of a written contract (in this case a promissory note) can not be varied by parol, does not exclude oral agreements made and performed subsequent to the execution of the written contract; and prior or contemporaneous agreements fully executed after the making of the written contract become, by their fulfillment, subsequent agreements.

HUSBAND AND WIFE.—*Wife Purchasing Real Estate and Taking Title in Husband's Name.*—*Suretyship of Wife.*—*Debtor and Creditor.*—Where a married woman bought real estate, giving her note, secured by mortgage thereon, in part payment of the purchase-price, and took the title in the name of her husband, the relation of debtor and creditor was not created between the husband and vendor, and consequently the wife could not occupy the position of surety for her husband.

From the Carroll Circuit Court.

L. D. Boyd, for appellants.

C. R. Pollard and R. C. Pollard, for appellee.

HACKNEY, C. J.—The appellee sued the appellants to recover, as against George W. Collins, the balance of the purchase-price of certain real estate sold to him by the

appellee, and as against all of the appellants, the foreclosure of a mortgage of said real estate executed to secure such balance. The appellants answered that at the time of the purchase, it was agreed between said George W. Collins and the appellee, that the note given for such balance might be paid by delivering drain tile to the appellee or her husband; that pursuant to said agreement, and before suit, said Collins did deliver to the appellee and to her husband, and they did receive from him drain tile of a value stated. It also alleged that in addition to the value of the tile so furnished, the said Collins performed certain services for the appellee at her request, the value of the tile and of the services exceeding the amount due on said note.

The lower court sustained a demurrer to this answer, and that ruling presents the only question made by the record. The sufficiency of the answer is attacked upon two grounds; first, that it sets up a contemporaneous parol agreement, varying the terms of the written contract, and, second, that the facts pleaded constitute the appellee a surety for a debt owing by her husband.

Of the first proposition, there can be no possible doubt as to the rule urged, but in the application of the rule, if it appear that the terms of the collateral, oral agreement have been performed on the one side, and their fruits accepted by the other, such executed agreement is taken as a payment or satisfaction of the written obligation. *Tucker v. Tucker*, 113 Ind. 272; *Zimmerman v. Adee*, 126 Ind. 15.

The rule urged by the appellee does not exclude oral agreements made and performed subsequently to the execution of the written contract, and prior or contemporaneous agreements, fully executed after the making of the written contract, become, by their fulfillment, subsequent agreements. If it were otherwise, the rule, itself

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intended as a shield against fraud, would become an instrument of fraud.

There is, therefore, in this case, no variance of the terms of the note by the alleged contemporaneous agreement performed subsequently to the execution of the note.

Counsel insist that the case of *Tucker v. Tucker*, *supra*, is not in point, because, as claimed, it was decided upon the fact that the note there sued upon was executed only as a security for the subsequent performance of a prior oral agreement. The controlling element of the case was upon the point here involved, and to the same point it was cited in *Zimmerman v. Adee*, *supra*.

The contention of counsel that the facts pleaded in the answer constitute the appellee a surety for her husband's debt proceeds upon the theory that, having received no benefit from the title supplied to her husband, and having been obligated to pay for it, she necessarily became a surety. The facts pleaded do not disclose that her husband was a debtor, without which it would be difficult to conceive of her relation as that of surety. The facts pleaded show that the credit, as to the title, was extended to the appellee, and that her liability, if any, was primary, and neither contingent nor collateral.

In construing the second subdivision of section 6629, R. S. 1894 (R. S. 1881, section 4904), of the statute of frauds, which denies an action "to charge any person, upon any special promise, to answer for the debt, default or miscarriage of another," it has frequently been held that a promise to pay for property delivered to another is not within the statute, for the reason that the promise was a direct, and not a collateral, obligation. *Lance v. Pearce*, 101 Ind. 595; *Boyce v. Murphy*, 91 Ind. 1; *Wills v. Ross*, 77 Ind. 1; *Johnson v. Hoover*, 72 Ind. 395; *Kernodle v. Caldwell, Admr.*, 46 Ind. 153.

So, in this case, the fact that the tile were delivered

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to the appellee's husband, upon her contract and assumption, did not create the relation of debtor and creditor between the husband and Collins, nor does the conclusion necessarily follow that the appellee received no benefit from such delivery.

In our opinion the ruling of the circuit court was erroneous, and the judgment is therefore reversed, with instructions to the lower court to overrule the appellee's demurrer to the appellants' answer.

Filed Nov. 22, 1894.

 No. 16,326.

BOZEMAN ET AL. v. CALE ET AL.

SUPREME COURT PRACTICE.—*Appeal.—Parties to Judgment.—How Ascertained.*—In order to ascertain who the parties are to a judgment appealed from, the appellate tribunal will look through the record to the pleadings, and, if necessary, to the summons.

APPEAL.—*Dismissal.—Defect of Parties.—Jurisdiction.*—Where parties to the judgment appealed from have not been made parties to the appeal by the assignment of errors and service of notice, complete jurisdiction has not been conferred on the appellate tribunal, and the appeal will be dismissed.

SAME.—*When Not Perfected.—Defect of Parties.*—Without notice to, or appearance by, all the parties to the judgment, the appeal remains unperfected, and all the parties to the judgment appealed from are not before the court; and the cause can not be heard on its merits.

From the Vanderburgh Superior Court.

G. V. Menzies, A. Gilchrist, C. A. DeBruler, B. K. Elliott and W. F. Elliott, for appellants.

J. E. McCullough, J. H. Miller and W. P. Edson, for appellees.

DAILEY, J.—This was an action brought by the ap-

139	187
136	557
139	187
141	702
139	187
144	367
145	332
146	177
139	187
149	606
150	703
139	187
154	442
156	228
139	187
159	373
139	187
171	246

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pellee James Cale and thirty-nine others named in the amended complaint, against the appellant Bozeman, as contractor, and the auditor and treasurer of Posey county, to restrain the collection of certain assessments for the construction of a ditch under the drainage act of 1875.

The suit was commenced in the Posey Circuit Court on the 21st day of May, 1886. A change of venue was afterward taken to the Vanderburgh Superior Court, where, on November 25, 1890, the cause was submitted to the court for trial, and the court found and adjudged that the defendants (appellants herein) be perpetually enjoined from collecting any of said assessments.

The appellants moved in arrest of judgment, and filed their motion and written reasons for a new trial, which motions were severally overruled, and they prosecute this appeal.

On March 1, 1893, James Cale, James G. Nesbit and Joseph Cale, of appellees in this cause, moved the court to dismiss the appeal of the appellants herein, and specified several causes, among which are, that the assignment of errors does not contain the names of the necessary parties; that the appeal herein was not taken within one year from the time the judgment from which it is prosecuted was rendered; that before the submission of the cause in this court, to wit, on the 29th day of January, 1892, the appellants herein filed their motion in this court to dismiss this appeal as to the appellees John Walker, James Redman and Moses Yeager, which motion was, on February 2, 1892, sustained by this court, and said appeal dismissed as to said appellees; that said appellees were parties plaintiff to the judgment from which this appeal is prosecuted, and necessary parties to the appeal, but neither they nor any representative or substitute for them were parties to this appeal at the time of the submission of the cause in this court, or at any

time since; that Andrew J. Wasem, treasurer of Posey county, is a coparty of the appellants in the judgment from which this appeal is taken, and no notice has been served upon him, nor has he joined in this appeal, nor was this appeal taken at the time at which said judgment was rendered.

An examination of the record discloses that among the parties plaintiff to the judgment, from which this appeal is prosecuted, are John C. Cox, Elizabeth Benson, Jesse Kimball, George Meadows, James T. Alcorn, George W. Johnson, Marvel Knowles, Thomas Brown, James Drake, Hannah Christy and Charles Christy. They were all parties plaintiff in both paragraphs of the amended complaint, their names are all set out in the title of both paragraphs, but are not named in the assignment of errors.

The finding or decision of the court upon the issue tried was in favor of all the plaintiffs. The final judgment is in favor of the plaintiffs and all of them, without exception, and this is also true as to the judgment for costs.

We think we must look to the complaint in the cause and the subsequent steps taken as shown by the record, to ascertain who are the parties plaintiff in this action. An examination of the record does not disclose that any of the parties above named ceased to be parties to the action by dismissal or otherwise.

The clerk's omission of the names of any of the plaintiffs from the title to the entry in the order-book does not eliminate the parties whose names are left out, from the cause. On the contrary, upon appeal, in order to ascertain who are the parties to the judgment appealed from, the court will look through the record to the pleadings, and, if necessary, to the summons.

Written dismissals were filed by several of the parties

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plaintiff in the lower court, and in this court the appeal was dismissed as to appellees John Walker, James Redman and Moses Yeager, but none of the parties embraced in appellees' motion were affected by these judgments of dismissal. Appellants having failed to make said Cox, Benson, Kimball, Meadows, Alcorn, Johnson, Knowles, Brown, Drake, Christy and Christy parties to the appeal, by the assignment of error and the service of notice, we will have to apply the elementary rule in appellate proceedings that all the parties to, and affected by, the judgment appealed from, must be actually or constructively included in the appeal, upon the principle that those only before the Appellate Court are bound by the appeal, and hence that the inclusion of all the parties to the judgment appealed from is necessary to confer complete jurisdiction upon the latter court. *Hunderlock v. Dundee, etc., Co.*, 88 Ind. 139; *Concannon v. Noble*, 96 Ind. 326; *Burns v. Singer Mfg. Co.*, 87 Ind. 541; *Douglass v. Davis*, 45 Ind. 493; *Sloan v. Whiteman*, 6 Ind. 434; Elliott's App. Proced., section 138; Buskirk's Pr., 50, 121.

Without notice to, or appearance by, all the parties to the judgment, this appeal remains unperfected, and all the parties to the judgment appealed from are not before this court. The cause is not, therefore, in a condition to be heard by us on its merits. *State, ex rel., v. East*, 88 Ind. 602; Elliott's App. Proced., section 522.

"The transcript is the source from which appellate tribunals obtain their knowledge of the facts involved in the controversy between the parties before them, as well as the source from which they derive their knowledge of the questions upon which it is their duty to pronounce judgment." Elliott's App. Proced., section 186.

"It is the duty of a party who asks an appellate tribunal to reverse the judgment of the trial court to bring

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to the higher court 'a perfect record.' " *Collins v. United States Expr. Co.*, 27 Ind. 11; *Fellenzer v. VanValzah*, 95 Ind. 128; *Morningstar v. Musser*, 129 Ind. 470.

"The record, as embodied in a properly prepared and duly authenticated transcript, imports absolute verity." *Walls v. Anderson, etc., R. R. Co.*, 60 Ind. 56; *Meredith v. Lackey*, 14 Ind. 529; *Beavers v. State*, 58 Ind. 530; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309.

And can not be aided, varied, or contradicted by extrinsic evidence. *Wishmier v. State, ex rel.*, 110 Ind. 523; *Justice v. Justice*, 115 Ind. 201; *Louisville, etc., R. W. Co. v. Boland*, 70 Ind. 595; *Du Souchet v. Dutcher*, 113 Ind. 249; *Evans v. Schafer*, 88 Ind. 92.

In *Snyder, Mayor, v. State, ex rel.*, 124 Ind. 335, this court said: "The assignment of errors is the appellant's complaint, and it must contain the names of the parties to the cause of action in full."

The motion to dismiss must be sustained.

Appeal dismissed.

Filed Dec. 13, 1893; petition to reinstate overruled Nov. 15, 1894.

 No. 16,513.

GARR, SCOTT & CO. v. SHAFFER ET AL.

139	191
142	489
143	704

EVIDENCE.—*Res Gestæ*.—*Declarations*.—*Personal Property*.—*Possession*.—*Title*.—Declarations of one in possession of property and claiming the title, that she is the owner thereof, are admissible in evidence as a part of the *res gestæ*, in an action involving the question of title thereto.

SAME.—*Consolidated Actions*.—*Ownership*.—*Declarations*.—*When Original Evidence*.—*Character Evidence*.—Where several cases to foreclose a chattel mortgage and for the recovery of personal property have been consolidated, evidence as to statements by a party to one of

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the possessory actions, as to ownership, out of court, in contradiction to her statements as a witness in court, would be original evidence against her as a party; and as to those cases to which she was not a party, her statements as to ownership would not be binding and are inadmissible; and as evidence of such declarations made out of court are not impeaching, it would be error to allow character evidence to be introduced in her favor.

From the Cass Circuit Court.

M. Winfield, C. E. Taber, R. C. Pollard and C. R. Pollard, for appellant.

L. D. Boyd and E. B. McConnell, for appellees.

HOWARD, J.—The appellant, a corporation, brought an action against the appellees, Homer J. and David A. Shaffer, to foreclose a chattel mortgage and for the recovery of personal property.

Afterwards, the appellee Samuel A. Shaffer, and the appellee Sarah A. Shaffer, brought separate actions against the appellant and against the sheriff for the return of certain items of the mortgaged property taken under the writ of appellant.

There was a change of venue from Carroll to Cass county, and the causes were tried together, resulting in special findings by the court and a decree in favor of the appellant, except as to the property claimed by Samuel A. and Sarah A. Shaffer.

The evidence was heard but once, and as so heard was applied by the court to the several actions as consolidated.

It is objected by appellant that evidence was received to prove declarations of Sarah A. Shaffer, made before the commencement of her action, and in the absence of appellant, to the effect that she owned and claimed certain of the property involved in this appeal. She was in possession of the property at the time her declarations of ownership were made, and we think that the declarations

and claims were, therefore, properly shown, to be considered with other evidence in deciding the question of title to the property. They were a part of the *res gestæ*. *McConnell v. Hannah*, 96 Ind. 102; *Tyres v. Kennedy*, 126 Ind. 523.

The appellant introduced evidence to show that Sarah A. Shaffer, at the time appellant's writ was served, had admitted that all the property seized by the sheriff, except one horse, belonged to her husband, the appellee, David A. Shaffer.

Sarah A. Shaffer was afterwards called and denied these admissions, and denied, also, that the conversations in which it was claimed such admissions were made ever took place.

On the theory that the witness, Sarah A. Shaffer, was thus impeached by evidence as to statements made by her out of court, contradictory to those made by her as a witness on the trial, other witnesses were called, who testified to her general good character and her good repute for truth and veracity.

Appellant objected to the introduction of such testimony in favor of the good repute of Sarah A. Shaffer for truth and veracity, and contended that her good repute in this particular had not been attacked, but that her admissions out of court, being proved upon the trial, were to be taken as original evidence against her as a party.

This contention must be held good when made concerning the action in which Sarah A. Shaffer was herself a party, as we said on the first hearing of this case.

But, on that hearing, it was also held that the evidence as to statements of the witness Sarah A. Shaffer was applicable to all the actions, which were tried together, the evidence being heard but once. If that were

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true, then, as to those actions to which she was not a party, such evidence as to statements by her out of court, in contradiction to her statements as a witness in court, would be impeaching; and, consequently, witnesses might be called to sustain her character as to those cases. For the court, hearing the evidence once for all the cases, might apply it in its proper order; and if her evidence as to ownership of the property were applied by the court before applying the evidence as to contradictory statements made by her out of court, then, certainly this last evidence would be impeaching, and witnesses as to her character for truth and veracity might be introduced.

A further examination of the case, however, makes it apparent that the evidence as to her admissions, while competent as to the case in which she was a party, was not competent as to the other cases. Her admissions, if proved, would be good against herself, but could not bind others. As to those cases in which she was not a party, her admissions or other statements as to ownership of the property would be mere hearsay.

Sarah A. Shaffer's admissions, therefore, were evidence only against herself in the case in which she was herself plaintiff. The fact that the evidence was heard but once, and applied by the court to the several cases, did not make it proper to apply the evidence of her admissions to any case but that in which she was herself a party.

But as to Sarah A. Shaffer, plaintiff in her own suit, proof of her admissions that the property was not her own was original testimony against her, and not impeaching simply. Consequently it was error to allow her to introduce character evidence in her favor. *Logansport, etc., Turnpike Co. v. Heil*, 118 Ind. 135.

The judgment in favor of Sarah A. Shaffer must, therefore, be reversed. The three cases, however, and

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the three judgments rendered, are quite independent, and the error in the case of Sarah A. Shaffer does not in any way affect the other two cases, and the judgments in those cases will stand.

In *First Nat'l Bank, etc., v. Williams*, 126 Ind. 423, it was said: "It is objected that the court erred in overruling the plaintiff Williams' motion for a new trial, and granting a new trial to Helm on his motion, but there was no error in this, if Helm was entitled to a new trial and Williams was not. Their rights were separate and distinct."

We have here not one case but three distinct cases. But even in one case, where the rights of the parties are several and distinct, or the issues different and independent, a new trial may be awarded as to a part of the case. Elliott's App. Proced., section 844. See also *Houston v. Bruner*, 39 Ind. 376, and *Parsons v. Stockbridge*, 42 Ind. 121.

The judgment and decree in favor of Garr, Scott & Co. against Homer J. and David A. Shaffer is affirmed, as is also the judgment in favor of Samuel A. Shaffer against Garr, Scott & Co. The judgment in favor of Sarah A. Shaffer against Garr, Scott & Co. is reversed, with instructions to grant a new trial in that case.

Filed Nov. 20, 1894.

Burt *et al.* v. Hasselman.

No. 17,016.

BURT ET AL. v. HASSELMAN.

TITLE.—*Judicial Sale.—Authority to Make.*—Title under a judicial sale can not be maintained without an affirmative showing that the sale was made upon a writ authorized by the judgment.

SAME.—*Judicial Sale.—Authority to Make.—Deed.*—While the deed may be evidence of the sale, yet it is not evidence of the power or authority to make it.

NOTICE.—*Of Issuance of Precepts for Street Assessments.—Validity of.—Error in Amount of Assessment.*—The notice of the issuance of precepts for street improvements is not invalid as to an assessment, where the notice states the amount of assessment at \$32.10 instead of \$32.20, the correct amount, as the law does not observe trifles, and the error not being such as to deceive or control the action of one of ordinary business capacity.

From the Marion Circuit Court.

W. H. H. Miller, F. Winter and J. B. Elam, for appellants.

M. Moores, for appellee.

HACKNEY, C. J.—The appellee sued to quiet his title to the lot in question, and the issue in this court arises upon a special finding made by the trial court.

Both the appellee and the appellant Doretta Burt claim title from Dion Boucicault, the latter through sales for delinquent taxes and public improvements, and the former under a judicial sale in attachment proceedings.

The special finding, in stating the source of the appellee's title, finds a judgment and a deed in favor of, and to, the appellee, and that said deed contained a recital "that said real estate had been sold by the sheriff upon the judgment aforesaid, on the 1st day of August, 1885, to said Hasselman, for the sum of \$151.32, and that said sale had not been redeemed."

No fact is found as to the issuance of, or sale under, any

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writ upon said judgment. If, as appellants insist, title under a judicial sale can not be maintained without an affirmative showing that the sale was made upon a writ authorized by the judgment, this judgment must be reversed.

That it can not be maintained, is a rule expressly held and recognized in this State for more than seventy years. *Armstrong v. Jackson*, 1 Blackf. 210; *Frakes v. Brown*, 2 Blackf. 295; *Roe on Demise v. Ross*, 2 Ind. 99; *Carpenter v. Doe on Demise*, 2 Ind. 465; *Mercer v. Doe on Demise*, 6 Ind. 80; *Brownfield v. Weicht*, 9 Ind. 394; *Lewis v. Phillips*, 17 Ind. 108; *Evans v. Ashby*, 22 Ind. 15; *White v. Cronkhite*, 35 Ind. 483; *Huddleston v. Ingels*, 47 Ind. 498; *Splahn v. Gillespie*, 48 Ind. 397; *Vandever v. Hardy*, 51 Ind. 499; *Nichol, Admr., v. McCalister*, 52 Ind. 586; *Shipley v. Shook*, 72 Ind. 511; *Turner v. First Nat'l Bank, etc.*, 78 Ind. 19; *Teal v. Langsdale*, 78 Ind. 339; *La Plante v. Lee*, 83 Ind. 155.

In the cases above cited, of *Armstrong v. Jackson*; *Nichol, Admr., v. McCalister*, and *Teal v. Langsdale*, it was held indispensable to such title that the writ be shown.

The reason for the rule is that a valid sale must be supported by power and authority to make it. The officer making a sale, as said in *Armstrong v. Jackson*, *supra*, derives his power from the writ, and the authority of the writ to warrant the sale is derived from the statute. The requirement of the rule does not involve a question of mere irregularities in the execution of the power conferred by the writ, and, therefore, matters of notice, appraisement, offering in parcels, and return of the writ will be presumed regular until the contrary appears affirmatively. This is the character of the holding in the cases cited by the appellee. *State, ex rel., v. Salyers*, 19 Ind. 432; *Culbertson v. Milhollin*, 22 Ind. 362; *Ferrier*

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v. *Deutschman*, 81 Ind. 390. In addition to the principles in the foregoing cases, as we have announced them, it was expressly held in *LaPlante v. Lee*, *supra*, that the recitals in a deed, under a judicial sale, are not evidence of the authority to make the sale. While the deed may be evidence of the sale, it is not evidence of the power or authority to make it.

The title of the appellant Doretta Burt derived from the sale for street improvements is said to be invalid from the fact that the notice of the issuance of the precepts (R. S. 1881, section 3165; R. S. 1894, section 3628), stated the amount of the assessment at \$32.10 instead of \$32.20, the correct amount. The notice required was to enable the owner to pay the assessment without sale or to appeal and contest the assessment.

The notice of sale required by the statute follows that above referred to, and gives the property-owner an additional opportunity to pay the lien and save his property. If the understatement of the amount of the assessment for which the precept was issued were in such sum as to control the action of the property-owner, either as to the payment of the amount or in appealing from the assessment, the error would involve very serious consideration; but since the difference is so insignificant it is not, in our opinion, of such importance as to influence the conduct of the owner of the property or affect the validity of the subsequent sale and title. If of any influence, it would have been to induce payment instead of default, and it was not of such consequence as to suggest affirmative resistance by appeal. We do not hold that a strict compliance with the statute, with respect to the notice of precepts, is not necessary to the validity of such sales, but any departure sufficient to overturn titles under such sales must be of such importance as to invite the attention of the law, and resist the maxim, *de minimis*

non curat lex (the law does not observe trifles). This maxim is given application where liens for public improvements and for taxes are sought to be enforced on the one side and to be avoided on the other. *Workman v. City of Worcester*, 118 Mass. 168; *Huntington v. Winchell*, 8 Conn. 45; *Spencer v. Champion*, 9 Conn. 535; *Kelley v. Corson*, 8 Wis. 182; *O'Grady v. Barnhisel*, 23 Cal. 287; *Thatcher v. The People*, 79 Ill. 597.

In the California case a tax deed for real estate sold for \$57.68 instead of \$57.62½, the contract amount, was sought to be avoided. The court said: "The respondent insists, however, that the overplus in this case is so small that the sale should not be invalidated on that ground, and that the maxim *de minimis non curat lex* is properly applicable. We are satisfied that we ought not to treat the sale as void for this trifling excess. If we could in any way see that the owner of the land had suffered any injury by the mistake in the estimate by the tax collector of the amount due, it would be very different. * * * The mistake may have occurred in the calculation, or it may have occurred by an error in making or copying the figures. But it is evident that it was unintentional, and without any design to injure the parties interested. * * * If this had been a sale under an ordinary judgment and execution, it could not be pretended for a moment that the sale would have been void on this account."

In the case before us, where the property received the benefit of the improvement for which it was sold, where the sale was for the proper sum, and where the error was not such as to deceive or control the action of one of ordinary business capacity, there is stronger demand for the application of the maxim than in the California case. There is in this case no intermediate ground between the validity and the invalidity of the appellant's

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title, and upon which we may hold the error insufficient to render the title wholly void and yet sufficient to secure the appellee's claim of title with a lien in appellant's favor for her payments with interest and costs. When we refuse to observe the trivial objection to the appellant's title, we find that the statute as to notice has been strictly complied with, and that the appellant's title is valid.

The judgment of the lower court is reversed, with instructions to restate its conclusions of law in accordance with this opinion.

Filed Nov. 15, 1894.

 No. 17,034.

MOORE v. ROSS ET AL.

139 200
156 622
156 624

STATUTE OF LIMITATIONS.—*Ten Year Statute.*—*Execution Sale.*—*Real Estate.*—*Misdescription.*—Where the judgment debtor brings action to recover real estate sold on execution, and it appears that the whole parcel, 15x60 feet, was sold on execution against her, though there was an evident mistake in the sheriff's deed, the description therein being 15x15 feet, possession being taken and retained under it for more than ten years before the commencement of suit to test the validity of the sale, the action is effectually barred by the ten year statute of limitation.

SAME.—*Execution Sale.*—*Statute Runs from Time of Sale.*—In such case the statute of limitations begins to run from the time of sale, and not from the time the deed is executed.

SALE ON EXECUTION.—*Foreclosure Decree.*—*Sheriff's Sale.*—A sale on a decree of foreclosure is a sale on execution within the meaning of the statute.

From the Madison Circuit Court.

F. S. Ellison, E. B. Goodykoontz and G. M. Ballard,
for appellant.

H. D. Thompson, T. J. Ellis and F. P. Foster, for ap-
pelees.

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MCCABE, J.—This suit was brought by the appellant against the appellees, to recover possession of a part of a lot in the town of Alexandria, in Madison county. The issues formed were such as to present the question on the trial thereof, whether the action was barred by the third subdivision of section 294, Burns R. S. 1894 (R. S. 1881, section 293), or not. So much of the section as is applicable reads as follows: "The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterward. * * *

Third. For the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within ten years after the sale."

It appears from the special finding, that Susan Leonard was the owner in fee of a part of lot number 3, in block number 4, in the town of Alexandria, in said county, described as follows: Commencing at the northeast corner of said lot, and running thence south 60 feet to a corner, thence west 15 feet to a corner, thence north 60 feet to a corner, thence east 15 feet to the place of beginning; that on said 19th day of February, 1874, said Susan Leonard and her husband conveyed the said property by the description above set out, by deed of general warranty, to the plaintiff Sarah A. Moore, in fee, and at the same time, the said Sarah A. Moore, her husband joining, executed a mortgage upon said lot, by the same description, to secure the payment of a note for the sum of \$153.75 for purchase-money on said property, due in ten months from date thereof; that said deed and mortgage were duly recorded, and said Sarah A. Moore, and her husband Joseph B. Moore, took possession of said property under said deed; that said Susan Leonard duly recov-

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ered a judgment foreclosing her said mortgage against said Sarah A. Moore and her said husband, in the Madison Circuit Court, at the June term thereof for the year 1875, for the amount thereof, in the sum of \$174.70 and costs; that afterwards a writ of execution was duly issued upon said judgment and decree of sale thereon, and placed in the hands of the sheriff of said county, who levied the same upon the property above described by the said description contained in said mortgage.

The judgment and decree were without relief from valuation and appraisal laws. After being duly advertised for sale in all respects pursuant to said judgment and order of sale, the said premises were duly sold by said sheriff on said execution, to said Susan Leonard, for \$43.60, and said sheriff thereupon issued to her a certificate of purchase, entitling her to a deed therefor at the expiration of one year from said sale. The sale was made on the 14th day of August, 1875, and was for the whole of the property as above described; that afterwards, on the 23d day of August, 1876, pursuant to said sale, said sheriff executed a sheriff's deed to said Susan Leonard, which deed recited that the sheriff had sold at said sale the whole of said real estate above described, but that the granting portion of said deed described the said real estate as follows: Commencing at the northeast corner of said lot number 3, in block 4, running thence south 60 feet to a corner, thence west 15 feet to a corner, thence north 15 feet to a corner, thence east 15 feet to place of beginning; that on the delivery of said deed to said Susan Leonard she entered into the possession of the whole of the property as described in the said mortgage, sheriff's sale, and sheriff's certificate of such sale, and held continuous and uninterrupted possession thereof until the 2d day of April, 1879, when she conveyed it to Mary C. Ross by the name of Cal

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East, Edward East and Clarence East, by deed which was duly recorded, said grantees being the present defendants; that said defendants at the time of such conveyance fully paid said Susan Leonard the purchase price, and took possession of the whole of said real estate under such deed, the description in their deed being the same as that contained in said mortgage and sheriff's certificate of sale; that said defendants have ever since held continuous and uninterrupted adverse possession of said property so mortgaged to said Susan Leonard for and during a period of 16 years since said sheriff's sale, and before the commencement of this suit, claiming under said Susan Leonard, and under her said purchase; that the plaintiff was the judgment and execution defendant in the foreclosure decree and judgment on which the property in controversy was sold by the sheriff as aforesaid.

The conclusion of law stated is that the plaintiff's cause of action is barred by the statute of limitations, and that she ought not to take anything by her suit.

The appellant contends, with apparent earnestness, that while the mortgage and foreclosure decree properly described the whole parcel of ground, and that the whole parcel was sold by the sheriff to Susan Leonard, and the sheriff's certificate of sale also properly described the whole parcel, yet the deed of the sheriff to the purchaser only having conveyed a parcel fifteen feet square, as appellant contends, instead of a strip sixty feet long and fifteen feet wide, as the mortgage, foreclosure, decree and sheriff's certificate of sale all showed it to be, as well as the possession under the sale for sixteen years, yet the statute quoted, it is claimed, can not be invoked to protect such a sale unless the deed was as perfect as the antecedent proceedings. In other words, the appellant contends that the limitation of ten years on the right of

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action of the execution debtor, his heirs or assigns, to recover real property sold on execution, can only apply to a case where there is a perfect deed executed by the sheriff; that therefore the bar here only applies to that part of the real estate sold embraced in the boundaries described in the sheriff's deed, and that is only a parcel 15 feet square, while the balance of the parcel described in the mortgage and sheriff's sale and certificate, and which it is sought to recover in this suit, it is claimed is not subject to the limitation prescribed in the statute because it has not been sold by the sheriff. But this assumption is not correct as either a matter of fact or matter of law. The sheriff did as a matter of fact legally sell the whole parcel, 60 feet long and 15 feet wide, and executed to the purchaser a certificate showing that he had done so, accurately describing the whole parcel and certifying that the purchaser would be entitled to a deed conveying to her the premises described at the expiration of one year unless they were sooner redeemed.

The statute inhibits the commencement of an action to recover real property sold on execution if not brought within ten years after the sale, not ten years after the deed is executed.

The execution defendant, and those claiming under him, are given ten years in which to bring an action to recover real estate sold on execution, if they wish to contest the validity of such sale. During that ten years, the sale is open to every conceivable legal objection to its validity. After the expiration of ten years next succeeding such sale, it is open to no objection that can be urged against it in an action by the execution debtor or his assigns to recover possession. If appellant's contention should be upheld, then the statute would be nullified. If the statute can only bar such an action where there is a valid sheriff's deed, the statute would have no

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effect whatever, because the action would be defeated without the aid of the statute. A sale on a decree of foreclosure is a sale on execution within the meaning of the statute. *Sedgwick v. Ritter*, 128 Ind. 209; *Orr v. Owens*, 128 Ind. 229.

In *Second Nat'l Bank, etc., v. Corey*, 94 Ind. 457 (467), this court said: "We are of opinion that where land is sold by a defective and insufficient description in the levy of the execution, advertisement, sale and conveyance of the land, and possession follows such sale and conveyance, the ten years' limitation will constitute a complete and effective bar to any action brought for the recovery of the land by the execution debtor, or by any person claiming under him by title acquired after the date of the judgment. Nothing can be said of a sale of land by such a defective and insufficient description further than to say that it is void and passes no title. But the statute of limitations above quoted applies to just such a sale. Thus, in *Brown v. Maher*, 68 Ind. 14, in speaking of the limitation heretofore quoted, this court said: 'It applies to void sales. If it did not, it would be a dead letter; for, if sales are not void, the purchaser needs no statute of limitation to protect his title.'"

To the same effect are *Walker v. Hill*, 111 Ind. 223; *Vancleave v. Milliken*, 13 Ind. 105. These cases are decisive of the question against the appellant. She being the execution debtor, and it appearing that the whole parcel was sold on execution against her, though there was an evident mistake in the sheriff's deed, possession being taken and retained under it for more than ten years before this suit was brought, the action is effectually barred by the statute. The circuit court did not err in its conclusion of law.

The judgment is affirmed.

Filed Nov. 20, 1894.

 Lynch v. Bates et al.

No. 17,068.

LYNCH v. BATES ET AL.

INSTRUCTIONS TO JURY.—*Intoxicating Liquors.—Application for License to Sell.—Duty of Jury.*—"Lobby."—In a case involving the fitness of an applicant for liquor license, the court refused the following instruction: "In passing upon this case, you will be governed by the law and the evidence, and it is your duty not to allow yourselves to be influenced by the presence of a lobby in the court room opposed to the granting of the plaintiff's petition."

Held, that in so far as the instruction informed the jury that they should decide the case according to the law and the evidence, free from passion or prejudice, and without being influenced by public sentiment or popular clamor, it was correct; but in so far as it characterized the people in attendance upon court as a lobby who had packed the court room with intent to influence the jury to decide the case without regard to the evidence, the instruction was objectionable, as being itself calculated to prejudice the jury against the remonstrants.

SAME.—*Credibility of Witnesses.—Stated Generally.*—Where, in instructing the jury, the credit that ought to be given to witnesses is stated generally, without making particular allusion to any witness or class of witnesses in the case, there can be no well founded objection thereto.

SAME.—"Should" and "May."—*Province of Jury.*—In such case, the matter predicated should be introduced by the word "may" instead of "should," as the word "should" in that connection seems, in a measure, to invade the province of the jury.

INTOXICATING LIQUORS.—*License to Sell.—Fitness of Applicant.—Instruction to Jury.—Intoxication.—Law and Fact.*—Where, in an application for license to sell intoxicating liquors, the court instructed the jury, in substance, that if they find that the petitioner has been intoxicated in a public place, they should refuse him a license, is erroneous. From the fact that it is a misdemeanor, subject to a fine, for a person, even on one occasion, to become intoxicated in a public place, it does not follow, as a matter of law, that such a person is disqualified, under the law, to obtain a license.

SAME.—*Judgment Correct Upon Merits of Case.—Reversible Error.*—That there was evidence tending to support certain other charges of immorality and unfitness on the part of the applicant, can not avail to satisfy the mind of the court that the verdict of the jury was based upon such charges and evidence, and the court can not say

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140	269
142	293
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146	444
147	228
147	385
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156	230

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that the judgment is right upon the merits of the case, the evidence not all being in the record, and the facts not being fully found.

From the Howard Circuit Court.

J. F. Morrison, J. E. Holman, J. C. Blackledge, C. C. Shirley and B. C. Moon, for appellant.

J. O'Brien and C. Wolf, for appellees.

HOWARD, J.—The appellant made application to the board of commissioners of Howard county for a license to sell intoxicating liquors. The appellees filed a remonstrance to the granting of the petition. Upon a hearing had the board refused to grant the license; and an appeal to the circuit court resulted in a verdict and judgment for the remonstrants.

The error assigned in this court is the overruling of the motion for a new trial; and the questions discussed by counsel relate to the giving and the refusal of certain instructions to the jury.

The appeal was taken under the following provisions, contained in section 662, R. S. 1894 (section 650, R. S. 1881): "When in any case an appeal is prosecuted upon the question of the correctness of instructions given or refused, or the modifications thereof, it shall not be necessary to set out in the record all the evidence given in the cause, but it shall be sufficient in the bill of exceptions to set out the instructions or modifications excepted to, with a recital of the fact that the same were applicable to the evidence in the cause."

Bills of exceptions are properly in the record in compliance with the foregoing provisions of the statute.

Even in the absence of such statute, this court would presume, unless the contrary should appear, that there was evidence to which the instructions given were applicable. *Drinkout v. Eagle, etc., Works*, 90 Ind. 423; *Rozell v. City of Anderson*, 91 Ind. 591.

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The following instructions, requested by appellant, were refused:

"11. In passing upon this case you will be governed by the law and the evidence, and it is your duty not to allow yourselves to be influenced by the presence of a lobby in the court room opposed to the granting of the plaintiff's petition."

"12. The law contemplates the public trial of causes, but it is improper for persons interested in causes, to pack the court room with their friends and partisans for the purpose of influencing the action of a jury. You will, therefore, be careful not to allow the presence in the court room of the large number of persons who are taking an active interest in behalf of the defendants and their actions and wishes (outside the evidence in the case) to influence you in favor of the defendants in making your verdict."

In so far as these instructions were calculated to inform the jury that they should decide the case according to the law and the evidence, free from passion or prejudice, and without being influenced by public sentiment or popular clamor, they were correct; but in that respect the instructions were fully supplemented by other instructions given to the jury. In so far, however, as the instructions characterized the people in attendance upon court as a lobby who had packed the court room with intent to influence the jury in partisan spirit to decide the case without regard to the evidence, we think the instructions were objectionable, as being themselves calculated to prejudice the jury against the remonstrants.

It is the right of the people to attend trials in court; and, provided such attendance is orderly and respectful of the dignity and procedure of the court, no objection can be made simply on the ground that the questions at issue are of great public interest.

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It might be that in a proper case a judge would find it his duty to warn a jury against being influenced by demonstrations on the part of those in attendance upon a trial, but we do not think this was such a case. The jury were sufficiently advised as to their duty in this regard; and if the audience behaved improperly, it was the right of the court to admonish them, and of the officers of court to preserve order.

The following instruction, given by the court on its own motion, is objected to:

"1. You are the exclusive judges of the credibility of the witnesses, and the weight to which their testimony is entitled. In passing upon these questions, you should take into consideration the interest the witness has in the suit, if any; the bias or prejudice of the witness, if any be shown; the opportunity the witness had of knowing and recollecting the facts about which he has testified; the fact whether the witness has been corroborated or contradicted by other witnesses who have testified in this cause. In case there is any apparent contradiction in the testimony of the different witnesses who have testified in this case, it is your duty to attempt to harmonize such apparent contradictions so as to give full weight and credit to all the witnesses; but if you can not so reconcile such apparent contradictions, if any, so as to believe all the witnesses, then you must determine for yourselves what witnesses you will not believe."

Counsel contend that the manifest purpose and effect of this instruction was to discredit as witnesses the appellant and one of the sureties on his appeal bond in the circuit court, on account of their interest in the suit.

We can not see that there is any force in this contention. The instruction singles out no witnesses by name or by allusion, and the instruction applies to all wit-

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nesses on both sides, who may be affected by it. The language, so far as relates to persons, is as general as it could well be made.

Counsel cite *Unruh v. State, ex rel.*, 105 Ind. 117, and other like cases, in support of their contention; but we do not consider that the cases cited are in point on the question.

In *Unruh v. State, ex rel.*, *supra*, the language objected to in the instruction was: "The relatrix and defendant have testified, and they are both interested in the event of the suit. This fact should be considered in weighing their evidence, in connection with the other facts and circumstances which I have indicated apply to witnesses generally."

This court rightly disapproved of this language. It singled out two witnesses and discredited them by name before the jury. This can not be done by the court, and such will be found to be the character of the objectionable instructions in all of the cases relied upon by appellant in this contention.

Where, however, the credit that ought to be given to witnesses is stated generally to the jury, without making particular allusion to any witness or class of witnesses in the case, no objection on this score can be made.

With one exception, we think the instruction here complained of is entirely unobjectionable, and is a fair and correct statement of the law upon the question as to the credit to be given to witnesses. While we do not believe, considering the whole instruction together and other instructions given, that the jury were misled in any degree by the language used; yet we do think that, in the first part of the instruction, where the jury are told that they "should" take into consideration the interest, if any, which a witness has in the result of a suit, the word used ought to be "may," and not "should." The

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use of the word "should" in that connection seems, in some measure, to invade the province of the jury. The jury ought to be informed as to what circumstances they may take into account in weighing the evidence heard by them; but, as this instruction itself informs them, they are themselves "the exclusive judges of the credibility of the witnesses and the weight to which their testimony is entitled." *Nelson v. Vorce*, 55 Ind. 455; *Woolen v. Whitacre*, 91 Ind. 502; *Dodd v. Moore*, 91 Ind. 522.

The following, requested by appellees and given by the court, is also objected to: "If the jury believe, from the evidence in the case, that the petitioner has been in a public place, such as a street, sidewalk, or depot platform, in a state of intoxication, this is a public offense of such a character as would subject him to a fine upon conviction therefor, and is such an act of immorality within the meaning of the words as used in the law regulating the licensing and sale of intoxicating liquors, and you should find for the remonstrants."

The grammatical construction of this charge is somewhat at fault, but the meaning is obvious.

It is the office of an instruction to inform the jury of the law in a case; the jury find the facts for themselves.

It is contended that the foregoing instruction misstates the law, and also that it invades the province of the jury.

The law upon which the instruction is based is found in section 7273, R. S. 1894 (section 5314, R. S. 1881): "It shall be the privilege of any voter of said township to remonstrate, in writing, against the granting of such license to any applicant, on account of immorality or other unfitness, as is specified in this act."

And, in the succeeding section of the statute, where it is declared that one who has complied with certain preliminaries shall be granted a license, "*Provided*, said

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applicant be a fit person to be intrusted with the sale of intoxicating liquor, and if he be not in the habit of becoming intoxicated; but in no case shall a license be granted to a person in the habit of becoming intoxicated."

The law charged in the instruction is, that if the petitioner has been in a public place in a state of intoxication, this is a public offense of such a character as would subject him to a fine upon conviction, and is such an act of immorality, within the meaning of the law regulating the licensing and sale of intoxicating liquors, as would require the jury to find for the remonstrants. In other words, if the jury find that the petitioner has been intoxicated in a public place, they should refuse him a license.

The statute, as we have seen, declares the law as to intoxication to be that the applicant shall be refused a license if he be "in the habit of becoming intoxicated." But a single act of intoxication does not constitute "the habit of becoming intoxicated." The word habit has a clear and well understood meaning, being nearly the same as custom, and can not be applied to a single act.

It is said, however, that the instruction refers to "immorality," and not to "intoxication," as these terms are used in the statutes cited. That would amount to saying that an act of intoxication is an act of immorality, for which a petitioner should be refused a license. If that were true the instruction would be a finding of fact by the court, and not a statement of law to the jury.

Because it is a misdemeanor, subject to fine, for a person, even on one occasion, to become intoxicated in a public place, it does not follow, as a matter of law, that such a person is disqualified under the liquor law to obtain a license.

The question should have been left to the jury to say,

from evidence of that act, if any there were, and from all the other evidence in the case, whether such act of intoxication was an act of immorality such as unfitted the applicant to be entrusted with the sale of intoxicating liquor. *Keiser v. Lines*, 57 Ind. 431; *Stockwell v. Brant*, 97 Ind. 474; *Hardesty v. Hine*, 135 Ind. 72.

Counsel for appellees finally contend that even if the instruction objected to were erroneous as charged, still the judgment is right upon the merits of the case, and ought not, therefore, to be disturbed, citing section 670, R. S. 1894 (section 658, R. S. 1881).

It is true, as counsel say, that in *Grummon v. Holmes*, 76 Ind. 585, and in *Groscop v. Rainier*, 111 Ind. 361, it was held that other kinds of immorality than the habit of becoming intoxicated may be made the grounds of a remonstrance against an applicant for license to sell intoxicating liquor; and also that in *Eslinger v. East*, 100 Ind. 434, it was held that in applications for liquor license evidence as to the surroundings, as nearness to schools and colleges, may be considered by the jury in determining the applicant's fitness to sell intoxicating liquors.

Because, therefore, in this case, there was evidence tending to prove other acts of immorality and unfitness on the part of the applicant, and because all the matters in support of which such evidence was given were made grounds of remonstrance, counsel say that the jury might rightfully find the applicant an unfit person to entrust with the sale of intoxicating liquors in the locality mentioned, even without considering the instruction as to the act of intoxication.

In making such contention counsel cite *Bronson v. Dunn*, 124 Ind. 252. In that case it was held, substantially, that since the findings of the jury, as shown by answers to interrogatories, made it clear that the evi-

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dence amply supported the verdict, without regard to the erroneous instruction, therefore the judgment was right upon the merits and ought not to be disturbed.

That holding, however, can not be taken as a precedent in this case. Here there was no finding of the facts, by answers to interrogatories or otherwise, nor is the evidence in the record, so that we are unable to say whether the judgment is right upon the merits or not. That there was evidence tending to support certain charges of immorality and unfitness on the part of the applicant, can not avail to satisfy the mind of the court that the verdict of the jury was based upon such charges and evidence. Unless all the evidence is in the record, or the facts be fully found, we can not say that the verdict is supported by evidence other than the evidence to which the erroneous instruction is applicable.

For the giving of the erroneous instruction complained of, therefore, the judgment must be reversed, with directions to grant a new trial.

Filed Nov. 16, 1894

No. 16,722.

FITCH v. THE SEYMOUR WATER COMPANY.

MUNICIPAL CORPORATION.—City.—Ordinance.—Water Company.—Police Regulation.—An ordinance in relation to a water company, for protection against fire, is not a police regulation, nor one which the municipality is under obligation to enact or enforce.

SAME.—City Ordinance.—Governmental Measure.—Water Company.—Insufficient Water Pressure.—Loss by Fire.—Liability.—Such an ordinance is a governmental measure which the city might enact or not, as seemed best. There is no public duty under such ordinance, the violation of which would render the city or the water company liable to any one who might suffer a loss of property by fire because of

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an insufficient water pressure, where sufficient pressure might have been supplied and the loss avoided.

SAME.—*Water Company.*—*No Public Duty.*—*No Privity in Contract, by Citizens.*—In such case the water company had undertaken no public duty which would make it liable to an inhabitant of the municipality, and the citizen has no privity in the contract of the city with the company.

From the Jackson Circuit Court.

W. K. Marshall, D. J. Schuyler, W. Olds, R. Applewhite and J. F. Applewhite, for appellant.

M. Moores and O. H. Montgomery, for appellee.

HOWARD, J.—The appellant brought this action against the Seymour Water Company, charging that he was a citizen and taxpayer of the city of Seymour; that the defendant company was supplying the city with water under a contract which provided that the company “shall constantly, day and night, except in cases of unavoidable accident, keep all of the city hydrants supplied with water, and upon receiving a fire alarm, shall at once furnish sufficient pressure for fire service, not, however, to exceed one hundred pounds to the square inch, and shall keep the fire hydrants in good working order and efficiency for fire service;” and was paid at the rate of four thousand dollars per year for the use of one hundred fire hydrants by the city of Seymour; that the appellant, Fitch, was the owner of a building used by him for the manufacture of chewing gum and other articles, and on November 23, 1891, this building was destroyed by fire, with its contents, belonging to Fitch, of the value of more than twenty thousand dollars; that the city of Seymour had, in all things, fulfilled its contract with the Seymour Water Company as to the payment of rent and other requirements, and that “defendant had machinery, water mains, pipes and hydrants of sufficient capacity and power to have furnished water in

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large quantities, sufficient to have extinguished said fire, before plaintiff's property could have been damaged by said fire more than \$500, and that defendant owed the duty to plaintiff to furnish water for the extinguishment of said fire as soon as it could possibly be extinguished, and it could have been extinguished within eight minutes after its commencement, and before plaintiff's property had been damaged by said fire more than \$500, as aforesaid, if defendant had furnished the pressure of water they could and should have furnished;" that the city of Seymour had two fire companies, organized in the State of Indiana, and under the ordinances of the city of Seymour; that it was the duty of said fire companies, as soon as the fire alarm was given, to go immediately and attach hose to a sufficient number of hydrants, and, by means of said hose, throw the water on said fire; that the alarm of fire was given when said fire was in its incipency, and before much damage had been done to plaintiff's property; said fire companies went immediately and attached their hose to four different hydrants, which was a sufficient number, and began to throw water on said fire within five minutes after said alarm was given, and could and would have extinguished said fire before plaintiff's property, aforesaid, had been damaged more than \$500 if they could have had an ordinary amount of pressure that they usually had from such waterworks, and which said waterworks, and the machinery, had the capacity and power to furnish; and which amount it was the duty of defendant to furnish, but said defendant negligently, carelessly and wrongfully failed to furnish the usual amount of pressure, and did not furnish one-third the amount said works had the capacity and power to furnish, and by reason of said failure, said fire companies could not and

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did not, throw water on said fire in such quantities, and with such force, as to check said fire.

The defendant demurred to the complaint, and its demurrer was sustained, and, on plaintiff's refusal to amend, judgment was rendered in favor of defendant, and the plaintiff appealed to this court.

The appellant contends that, under the facts pleaded and the ordinance, "the relation between the city of Seymour and the defendant was not in the nature of a contract, but was a franchise granted to the defendant by the common council under the powers conferred upon it by the constitution and the laws of the State, and, therefore, has all the binding force of a law, and is, in effect, a statutory enactment."

And that "The obligation of the defendant, therefore, under this ordinance, to the city of Seymour and its inhabitants was not one of contract, but was an obligation created by law, and the duty of the defendant to the city and the inhabitants, including the plaintiff, was a public duty, and one for any breach of which resulting in damage either to the city or its inhabitants (to the plaintiff in the case), the defendant would be liable for such damage."

The appellee holds that "The question is whether water companies, operating under contracts with cities, by which they agree to furnish sufficient water for fire protection, owe such a duty to inhabitants of the cities as to give the inhabitants a right of action against the water company for fire losses occurring through an insufficient supply of water."

And concludes that "The breach of a contract by a water company to furnish water to a municipality for the extinguishment of fires gives the citizen whose property is destroyed by fire no right of action against the water company."

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The cases cited by appellant to show a right of action in favor of an inhabitant of a municipality against an individual or a corporation for the violation of an ordinance of the municipality enjoining an obligation or a duty upon the individual or the corporation, are chiefly cases under police ordinances, being cases where the municipality is but an instrument for carrying out the behests of the State; or cases under ordinances for the improvement and care of streets, or like duties, being cases where the control of the municipality was such as to impose upon it an obligation which it consequently owed to the inhabitant for a neglect of duty.

But the ordinance in question is not a police regulation, nor one which the municipality was under obligation to enact or enforce. Under the statute the city had a right to enact an ordinance for protection against fire; but it was not bound to do so. In enacting the ordinance the municipality moved in its governmental capacity, in the general interests of the community. As a means to attain its object, the city contracted with the company for a water supply.

The ordinance, therefore, in so far as the inhabitants of the city and public interests generally were concerned, was a governmental measure which the city might take or not take, as seemed best; and no liability existed against the city for a failure to enact the ordinance, or for a failure to see that it was duly enforced. There could, then, be no public duty under the ordinance, the violation of which would render the city or those appointed to carry out the provisions of the ordinance liable to any one who might suffer. This, we think, follows from our decisions. *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Robinson v. City of Evansville*, 87 Ind. 334; *City of Lafayette v. Timberlake*, 88 Ind. 330; *Summers v. Board, etc.*, 103 Ind. 262.

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It must be, consequently, that if there is liability on the part of the company it is because of the terms of the ordinance as a contract with the city, in which contract the inhabitants had an enforceable interest. But while the inhabitants were interested in the contract made for their benefit, we do not think that this interest was such as gave the inhabitants the right to sue for its enforcement, or for damages occasioned by a failure to enforce it.

In a like case, that of *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, the court said: "The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like. It can not be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They can not hold such officers and agents liable upon the contracts between them and the city." See, also, *Becker v. Keokuk Waterworks*, 79 Iowa, 419.

In *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, the court said: "It was held in *Willey v. Mulledy*, 78

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N. Y. 319, that the neglect of a duty imposed by statute would give a right of action to any person having a special interest in its performance, and injured by the breach. The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for want of the requisite privity between the parties before the court. A case directly in point is *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59 (6 N. W. Rep. 126). See also *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24. There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. *Wright v. Augusta*, 78 Ga. 241; 7 Am. and Eng. Encyc. of Law, 997, *et seq.* We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law." See, also, *Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118; *Britton v. Green Bay, etc., Co.*, 81 Wis. 48; *House v. Houston Waterworks Co.*, 22 S. W. Rep. (Tex.) 277; *Ferris v. Carson Water Co.*, 16 Nev. 44; *Eaton v. Fairbury Waterworks Co.*, 37 Neb. 546.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, a contrary view is taken; but while the

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opinion of the court is a very well considered one, yet we do not feel that its reasonings are sufficient to overcome the strong current of reason and authority in favor of the view which we have taken.

We think that under the facts of the case at bar the water company had undertaken no public duty which would make it liable to appellant, and also that appellant had no privity in the contract of the city with the company.

The judgment is affirmed.

Filed June 20, 1894; petition for a rehearing overruled Oct. 9, 1894.

No. 17,077.

HUFFMAN v. COPELAND ET AL.

WILL.—*Husband and Wife.*—*Contract as to Disposition of Wife's Estate.*—*Effect Upon Husband's Inchoate Interest.*—*Election by Husband to Take Under Will.*—*Rights of Husband's Judgment Creditors.*—Where a wife executes a will devising all of her estate, excepting a bequest of one hundred dollars to the husband, to her children and grand children, in pursuance of a written contract between herself and husband whereby, in consideration that she should so devise her estate, he would relinquish all interest which he could take by virtue of the statute of descents, and upon her death he elects to accept the provisions of the will, as provided by the act of March 4, 1891, amending section 2485, R. S. 1881 (Acts 1891, p. 71), no interest in the wife's real estate vests in him but the property goes to the devisees free from any claim by the husband's judgment creditors.

From the Marion Circuit Court.

C. S. Denny, W. F. Elliott, J. L. Mitchell and J. L. Mitchell, Jr., for appellant.

W. H. H. Miller, F. Winter and J. B. Elam, for appellees.

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DAILEY, J.—The appellant, William D. Huffman, was plaintiff in the court below, asking that certain real estate described in his complaint be declared subject to execution and ordered to be sold to satisfy a judgment of \$8,553.01, recovered and held by him against the appellee, Joshua W. Copeland.

The facts stated therein are, in substance, that Margaret B. Copeland was the owner, at the time of her death, of the real estate therein set forth; that said Joshua was her husband, and the appellant recovered said judgment against him a number of years before, which was in force at the time of the testatrix's death. It is claimed that it became a lien at that instant, upon one-third in value of the real estate of which she died seized and which by descent was cast upon the surviving husband; that on the 27th day of March, 1892, while said Margaret was incurably ill and expecting to die, she and said Joshua, in order to cheat, hinder and delay his creditors, especially this plaintiff, and to prevent plaintiff from getting the one-third in fee of said real estate which would descend to him by law, and have been subject to plaintiff's judgment, caused a will to be made, which was probated on the 23d day of May, 1892, giving him but \$100, and devising and bequeathing the residue to her children and grandchildren; that on the 7th day of April, 1892, in furtherance of said arrangement, he agreed to accept the bequest and waive all interest he might have in the property under the law. The wife agreeing at the same time that the will should remain as her last will and testament, both of which agreements were indorsed on the will. It is also averred that said Margaret had full knowledge of the existence of said judgment against her husband, and of the latter's insolvency, and that the entire transaction was with the fraudulent intent on the part of Margaret and her hus-

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band of defeating and preventing the enforcement and collection of said judgment.

There was an answer filed to this complaint, in which it was shown that the will of said Margaret which devises all the real estate, that the appellant seeks to subject to his judgment, to the children and grandchildren of the testatrix, to the exclusion of any interest therein of her husband, Joshua W. Copeland, against whom alone appellant's judgment was recovered, was executed in pursuance of a written contract upon a valuable consideration between said Margaret and Joshua, whereby, in consideration that she would execute the will in question and permit it to become her last will and testament at her death, he would relinquish all interest in her estate, real and personal, which he would or could take by virtue of the statute of descents; that after the death of said Margaret, and within the time limited by the act of March 4, 1891, amended section 2485, R. S. 1881, Acts of 1891, p. 71, said Joshua elected, in manner and form as prescribed by this act, to accept the provisions of said last will and testament, in lieu of the provisions made by law in the estate of his deceased wife, etc.

The appellant demurred to the answer of the appellees. This demurrer was overruled, and he thereupon elected to stand upon his demurrer, and, refusing to plead further, judgment was entered in favor of the appellees, from which judgment this appeal is prosecuted.

The point is made and ably argued in the brief of the learned counsel for the appellant, that the answer does not deny the charges of fraud and fraudulent intent contained in the complaint. It is a well recognized rule of pleading that allegations of fraud, no matter how strongly made, avail nothing unless predicated of facts stated in the pleading which may be made the subject of fraudulent conduct, and the sufficiency of the pleading con-

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taining such charges must always be determined. If these do not show that a legal wrong has been done the party complaining, his cause is not helped by characterizing such facts as fraudulent. *Conant v. Nat'l State Bank, etc.*, 121 Ind. 323; *Bodkin v. Merit*, 102 Ind. 293; *Ham v. Greve*, 34 Ind. 18; *Darnell v. Rowland*, 30 Ind. 342; *Curry v. Keyser*, 30 Ind. 214.

The force and sufficiency of the pleading are, therefore, to be determined by the facts stated, and the answer is to be held good or bad upon demurrer as it does or does not state a defense to these facts.

The statute of descents, in force prior to the act of March 4, 1891, as affecting the question here presented, is contained in section 2485, R. S. 1881; Burns R. S. 1894, section 2642, which is as follows: "If a wife die testate or intestate leaving a widower, one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage."

In *Noble's Executrix v. Noble*, 19 Ind. 431, this court, in construing the section, held that by the force of this section and section 2488; Burns R. S. 1894, section 2649, one-third of the real and personal estate of a deceased wife descended to her husband, notwithstanding she had made a will by which it was attempted to make a different disposition of her property. In that case, however, no question, save that of the right of the wife to exclude her husband from any share in her estate by will, was presented or considered.

In *O'Harra v. Stone*, 48 Ind. 417, judgment creditors of the husband sought, as in the present case, to subject one-third of the real estate of a deceased wife to the payment of their judgment. It was shown in the defense that the wife had devised all her real estate to her two sons to the exclusion of any interest in her husband, and

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that he advised, counseled and consented to the making of said will, and acted as executor and never claimed any interest in the real estate.

It was held, in this instance, following *Noble's Executrix v. Noble, supra*, that under section 2485 the surviving husband took by descent, notwithstanding the testacy of his wife, one-third of her real estate, and that "his acquiescence in the will did not affect the rights of his judgment creditors." There was no question presented in the case as to the effect of a contract between the husband and wife pursuant to which the will was made. It was simply decided that merely passive acquiescence by the husband, or consent on his part, could not prevent the operation of section 2485 to cast one-third of the wife's real estate upon him by descent.

The case of *Roach v. White*, 94 Ind. 510, cited by appellant's counsel, was similar to *O'Harra v. Stone, supra*, as to the effect of mere consent by the husband to the making of a will by the wife excluding him from any interest in her real estate. The allegation of the complaint was that the will was made with a "full knowledge of all the foregoing facts on the part of the husband, and with his full consent thereto."

The court held that under section 2485, *supra*, "the right of the surviving husband to one-third part of the real estate of which his wife has died seized is absolute, *except in cases in which this right has been waived by some agreement, either ante-nuptial or post-nuptial, or where he is restrained by some estoppel which he has imposed upon himself.*"

It is further said in the case: "The facts, as stated, afford no pretense that there was any agreement on the part of the appellee to relinquish his inchoate interest in the real estate, or that there were any representations

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made by the appellee to the appellant tending to induce her to believe that he would assert no claim to the real estate so devised to her; indeed, there was nothing in the appellee's consent that his wife might devise the real estate to the appellant inconsistent with the claim he now makes as the surviving husband, since his wife could not, by her will, deprive him of his one-third interest in her lands."

This is a distinct recognition by the court that while mere acquiescence or consent on the part of the husband will not prevent him or his creditors from taking the interest so cast upon him by descent, an agreement on his part, antenuptial or postnuptial, whereby he relinquishes the same, or any conduct which creates an equitable estoppel against claiming such interest, will prevent him or his creditors from denying the right of the wife to devise, to his or their entire exclusion.

The precise question involved in the case at bar was ruled upon in *Wright, Admr., v. Jones*, 105 Ind. 17. There certain judgments had been recovered against Jesse Jones in the lifetime of his wife, and, upon her death, it was claimed that they became liens upon one-third, in fee, of the real estate of which she died seized. She left a will by which she devised to her surviving husband a life estate only in one parcel of her real estate, and all the residue thereof, in fee, to her children. The will was made pursuant to an agreement between her and her husband, by which, in consideration of the promise of the wife that she would make a will such as the one in question, he was to accept the provisions thereof for his benefit, and thereupon it was drawn pursuant to said agreement, and, after her death, the husband accepted the life estate devised to him in full of all interest in her estate, and took possession of the portion so devised to him, and permitted all the residue of said real estate to be

taken possession of by the other devisees. It was claimed that under these facts the wife had the same right to put her husband to an election to take or reject the provisions of her will, as a deceased husband had to compel his wife to elect, and that the mere fact that the husband had elected, after the death of his wife, to accept the will, prevented any estate vesting in him, except such as was devised to him by the will, while it was contended, on the other hand, that a husband could not be put to an election.

The court did not decide the case upon this point, but held that the facts stated showed that the will had been executed pursuant to a contract between the husband and wife, which was effectual to intercept the vesting in the husband of any interest in her estate or real estate except such as the contract provided for.

In its reasoning the court said: "If the husband prefers a life estate in a particular piece of the property, and to secure the desired estate promises to accept such a life estate and to relinquish his claim as to all other interest in his wife's property, and she, in consideration of that promise, undertakes to vest that life estate in him, the agreement is valid, because it possesses all the essential features of a contract. If the contract were carried into effect by the execution of a deed, it would, as it seems to us, be impossible to impeach it. No ground upon which it could be impeached occurs to us, and none has been suggested.

"The difference between the case we have put by way of illustration and the real cause consists simply in the method of vesting the life estate in the husband. In the supposed case the method is assumed to be by deed, while in the real case it is by will.

"We can not believe that the method of vesting, whether by deed or will, can change the legal aspect of the case,

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provided there is, as here, an execution of the contract by the husband by a family settlement and a delivery and an acceptance of the respective estates created by the wife's will. *Once it is granted that such a contract is valid, then it must follow that the method of vesting the estate is not of controlling importance.* Equity regards the substance of a transaction, and not the form. Where the substantial merits of a transaction bestow rights upon the parties, form is not of much moment."

It may be observed that the contract in this case was not in writing, and it was objected by the judgment creditors of the husband that it could not be enforced for that reason, but the court held that the objection of the statute of frauds was only available as between the parties to the contract, and it was decided upon the sole ground that the will had been made limiting the husband's interest to a life estate in one parcel, pursuant to a contract between the husband and wife whereby, in consideration that she would devise to him this interest in her real estate, he agreed that she might devise all the residue of her real estate to her children, which contract had been executed by the making of a will pursuant to its provisions, which the wife had allowed to become her last will and testament.

It is true, it was averred that the husband, when it was entered into, was free from debt, but the decision puts no stress upon this fact, and is made to turn solely upon the fact that there was a contract upon a sufficient consideration between the husband and wife for the making of the will in question and under which it was executed. It is apparent that the husband's freedom from debt can not be a material consideration. No matter how insolvent the husband may be, nor how many judgments may be outstanding against him, if the wife should desire to sell her real estate to a third person, and

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the husband, without receiving any part of the purchase-money, should join in the deed, the mere fact that he was indebted would not affect the transaction. The conveyance would be perfectly valid and the entire estate would pass to the grantee. In such case the creditors of the husband, whether by deed or otherwise, would have no lien against her real estate. They could not subject to the payment of their debts the husband's inchoate interest. It is too intangible to be reached, or in any way affected by his creditors. His interest is, in the lifetime of the wife, precisely of the same character as the wife's inchoate interest in his real estate. It has been held that the deed of the wife in which the husband joins, attempting to convey her inchoate interest in his real estate to a third person distinct from the husband's interest, is absolutely void. *McCormick v. Hunter*, 50 Ind. 186.

It has also been decided that the wife's inchoate interest is so intangible in its character that she can not maintain an action to quiet her title thereto. *Paulus v. Latta*, 93 Ind. 34.

Under these authorities it is clear that Copeland, at no time during the life of his wife, had any interest in her real estate that he could have conveyed, separately from the entire estate, for any purpose. It therefore follows that he had no interest that could have been subjected to the payment of his debts. It can not be successfully contended that at the time the contract was entered into between him and his wife the appellant could have levied an execution, issued upon his judgment, upon any interest in Mrs. Copeland's real estate, or that he had any lien upon any interest therein by virtue of his judgment, nor could it be contended that the joint deed of Mrs. Copeland and her husband would not have conveyed her real estate to the grantee, absolutely, free

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from any claim of the appellant by virtue of his judgment, nor would it make any difference that the transfer was without consideration. Nor can it be insisted that if Mrs. Copeland had intended to convey her land by deed, precisely as she has conveyed it by the will in question, the appellant could have prevented the husband from joining therein.

Under the statutes of this State, a married woman holds her real estate absolutely free from the debts of her husband, or from any control by him. Indeed she holds it precisely as if she were unmarried, except she shall not convey or mortgage the same unless her husband join in such contract, conveyance, or deed. R. S. 1881, section 5116; Burns R. S. 1894, section 6962.

It is not until after the decease of the wife that the husband acquires an interest in her real estate which may be subjected to the payment of his debts. It is the event of her death which creates such interest, and if before that time a contract has been made between her and him, which otherwise disposes of such interest, the contract so made precludes the vesting in him of any interest by descent.

The legislation of this State, in this line, for the past forty years, has been remedial in its nature and for the purpose of placing a married woman in a position, so far as her property is concerned, as entirely unfettered and independent of the husband's debts, as if she were unmarried. All this, however, would be defeated if, whenever he became insolvent or in debt, he was deprived of the power to enter into contracts with her by which she could dispose of it free of his inchoate interest. The strong equity, calling for the upholding of such agreements, can only be overcome by a superior counter-equity. But in this case the appellant, who is only a

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judgment creditor of Copeland, with nothing more than a general lien, has no equity whatever.

It is settled by this court that a judgment creditor has only such rights as the lien created by statute gives him, the extent and effect of which are measured by the statute, and that prior equities will prevail against a judgment lien. *Warren v. Hull*, 123 Ind. 126; *Shirk v. Thomas*, 121 Ind. 147; *Whipperman v. Dunn*, 124 Ind. 349; *Lord v. Bishop*, 101 Ind. 335; *Koons, Admr., v. Mellett*, 121 Ind. 585.

The cases of *Roach v. White, supra*, and *Wright, Admr., v. Jones, supra*, establish as the law of this State that a contract may be entered into between a husband and a wife by which any interest in her real estate which would go to him at her death by descent may be devised to other persons so as to preclude him or his creditors from asserting any claim thereto. It can not be that one-third of the real estate of which the wife dies seized descends to the surviving husband, despite any contract he may have entered into with his wife to preclude such descent. The inchoate interest of the husband in the lifetime of his wife is not such a vested interest as to be protected by the constitution against legislative change, or even entire abolition. *Noel v. Ewing*, 9 Ind. 37.

It was certainly competent for the Legislature, at any time before the husband's rights became vested by the death of the wife, to amend the law so as to enlarge her testamentary powers over her real estate as against the husband, and for a stronger reason it may be enlarged as against his creditors.

The act of March 4, 1891 (Acts of 1891, p. 71) amends section 2485, *supra*, by adding the following proviso: "*Provided*, If the wife shall have left a will, such widow may elect to take under the will, instead of this or any other law of descents of the State of Indiana, which

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election shall be made within ninety days after said will has been admitted to probate in this State and in the same manner as widows are now required to elect in such cases."

It is contended by the appellant that the husband was deprived of the power to make an election by the fact that the appellant had a judgment against him. But here the obstacle in the way of the appellant is that it must appear that he had some interest in the property of Mrs. Copeland by virtue of the judgment before and at the time Copeland made the election, otherwise he would have no concern in the matter. The effect of the proviso is to make the vesting of any interest in the surviving husband depend upon his election to take under the law and reject the will. Until such election is made, no interest vests in the husband except such as the law gives him. There must be affirmative action to take under the will before any interest vests in him under this section. The statute does not limit his right to elect by the fact that he shall be free from debt, by judgment or otherwise, and the court can not add such condition. Its construction should be such as to promote its manifest spirit rather than to restrict or defeat its purpose.

Guided by this reasoning, we are of the opinion that his election to take under the will instead of under the law, as shown by the answer, left him no interest whatever in his wife's real estate to which the appellant's judgment could attach; and that the court did not err in overruling the demurrer to the answer.

The judgment of the court below is affirmed.

Filed Nov. 22, 1894.

Warthen v. Siefert et al.

No. 16,950.

WARTHEN v. SIEFERT ET AL.

CONVEYANCE.—*By Cotenant of a Several Part Without Partition.*—A cotenant can not, by his own deed, and without the co-operation of the other cotenants, select and dispose of his several interest in the common property, even though the part attempted to be conveyed is only equal in value to his share.

SAME.—*Title Taken by Grantee of Cotenant.*—*Life Estate.*—*Remainder.*—Where the owner of a life estate in land acquires by deeds from remaindermen title in fee simple to an undivided two-fifths thereof, a conveyance by him, prior to partition, of a definite part of the land, actually equal in value to two-fifths of the whole tract, carries to the grantee only the life estate in such part and the undivided two-fifths of the fee simple thereof.

SAME.—*Partition.*—*Title.*—C., by devise from her father, owned for life forty acres of land with remainder over to her five children. Two of the children, A. and G., each sold an undivided fifth to the mother. Afterwards the mother conveyed to her daughter, A., and the latter's two children, ten acres off the west side of the tract, and shortly afterward conveyed to the same grantees six acres more but not naming any particular part of the tract. In partition proceedings brought by these grantees they were found to be the owners of sixteen acres off the west side, and the same was sold by commissioners, C. being the purchaser. C. then sold the sixteen acres to W.

Held, that the interest acquired by C. at this sale was only such as she had power to previously convey, viz., her life estate and undivided two-fifths interest in the sixteen acres, and that the conveyance to W. carried no more.

From the Vanderburgh Superior Court.

W. W. Ireland, for appellant.

W. S. Hurst, for appellees.

HOWARD, J.—It is contended on this appeal that the trial court erred in its conclusions of law upon the facts found.

From the facts, as specially found by the court on the request of the appellant, it appears:

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1, 2. That Nancy Calloway, by devise from her father, owned for life the forty acres in controversy, with remainder over to her five children, John, George, Benjamin, Matilda and Amanda.

3. That on January 19, 1856, George sold his undivided one-fifth interest to his mother, Nancy Calloway.

4. That on March 7, 1868, Amanda sold her fifth interest to her mother.

5. That on January 13, 1876, Nancy Calloway conveyed to her daughter Amanda and Amanda's two children ten acres off the west side of said land.

6. That on April 24, 1877, Nancy Calloway conveyed to said daughter and children six acres of said land, not naming any particular part of said forty acre tract.

7. That in partition proceedings brought by Amanda and her children in the Vanderburgh Circuit Court, the court found that they were each the owner of one-third of sixteen acres taken off the west side of said land, and ordered the same sold and the proceeds divided accordingly.

8. That on November 5, 1881, said sixteen acres were sold by the commissioner in partition to Nancy Calloway.

9, 10. That on August 26, 1882, Nancy Calloway conveyed said sixteen acres to the appellant, who at once entered into possession, and has so continued in possession ever since.

11. That on January 30, 1883, Matilda, her mother Nancy Calloway joining, conveyed her undivided fifth interest in said forty acres to appellant.

12. That on August 10, 1886, Nancy Calloway conveyed her undivided interest in said forty acres to her daughter, Amanda.

13. That on July 11, 1887, Amanda, her mother Nancy joining, conveyed twenty-four acres off the east side of said land to Catherine Busch, the deed containing the

statement that sixteen acres had theretofore been sold off the west side.

14. That Benjamin, son of Nancy Calloway, died leaving as his only heirs at law his widow and three children, Ella, Edgar and Nina.

15. That on June 2, 1887, Ella, daughter of Benjamin, conveyed her interest in said forty acres to Catherine Busch.

16. That on August 26, 1890, Catherine Busch conveyed twenty-four acres off the east side of said forty acres to the appellee Cassie Siefert.

17. That on June 29, 1891, the widow and two remaining children of Benjamin, deceased son of Nancy Calloway, conveyed their interest in said forty acres to said appellee, Cassie.

18. That on January 28, 1886, Nancy Calloway conveyed to said appellee Cassie the undivided two-fifths of said forty acres, the deed not being recorded until July 11, 1892.

19. That on July 8, 1892, Amanda conveyed to the appellee Cassie the undivided three-fifths of said forty acres, at which time the said Amanda had no interest in said land.

20. That John, son of said Nancy, died leaving his children as his only heirs at law, and as such entitled to their father's interest in said forty acres.

21. That Nancy Calloway, the life tenant, departed this life August 10, 1889.

22. That the appellee Cassie has been in possession of, and cultivating about, twelve acres on the east side of said land for nearly three years.

23. That said land is not susceptible of division without damage to the owners, and ought to be sold and the proceeds distributed among them.

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24. That said land is of the probable value of thirty-five dollars per acre, and is of equal value all through.

25. That all the deeds were of general warranty, except that of Amanda to her mother, Nancy, named in finding 4, which was by quitclaim.

The conclusions of law by the court were:

1. That the children of John, deceased son of Nancy Calloway, the appellee Cassie, and the appellant, are the owners in fee as tenants in common of said forty acres.

2. That said children of John are the owners of one-fifth, or five twenty-fifths of said land.

3. That the appellant, as the grantee of Matilda, daughter of said Nancy, is the owner of five twenty-fifths of said land.

4. That the appellant, by her purchase from Nancy Calloway of the sixteen acres off the west side of said land, took the interest of her grantor therein, which was her life estate, and the undivided two-fifths of the fee simple, which is equal to four twenty-fifths of the whole, making the entire interest of the appellant, nine twenty-fifths of said real estate.

5. That the appellee Cassie, as the grantee of the heirs of Benjamin, deceased son of Nancy Calloway, is the owner of five twenty-fifths of said land.

6. That the appellee Cassie, as the grantee of Nancy Calloway, is the owner of two-fifths of the twenty-four acres off the east side of said land, which is equal to six twenty-fifths of the whole, making her entire interest eleven twenty-fifths of said real estate.

7. That the facts as found in items 5, 6, 7 and 8 did not give to Nancy Calloway any greater estate in said sixteen acres than she had at the time she made the conveyance to her daughter Amanda and her grand children, as set out in item 5; and she could not, and did not, thereby convey any greater interest to the appellant

than she originally conveyed to her daughter and grand children. Said proceedings in partition only reinvested her with the rights she had before.

As to the ownership of the interests of two of the children of Nancy Calloway there can be no question. John's fifth interest has fallen to his children, as his only heirs. Matilda's fifth interest has gone to her grantee Elizabeth Warthen, the appellant.

Nor is any question made on this appeal, nor apparently was any made on the trial, as to the fifth interest of Benjamin. On his death it fell to his widow and three children. Two of the children and the widow conveyed their interest to the appellee Cassie. The other child, Ella, conveyed her interest to Catherine Busch; and it seems to have been taken for granted that Catherine Busch conveyed that interest to the appellee, in connection with her deed made of the twenty-four acres, August 26, 1890, as set out in finding 16. There is nothing, however, either in that or any other finding, showing directly any conveyance to any one by Catherine Busch of the interest received by her from Ella. But as the ownership of Ella's interest is not further considered in the findings, and is not brought in question in the briefs of counsel, we will pass it.

This leaves for consideration the ownership of the shares derived from the two remaining children, George and Amanda, one-fifth each.

The third and fourth findings show that the interests of George and Amanda were by them conveyed to their mother, Nancy Calloway, the life tenant, who thus became the owner, in fee simple, of the undivided two-fifths of the forty acres.

From the twenty-fourth finding, we learn that the forty acres were of the uniform value of thirty-five dollars per acre.

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With this fact in mind, undoubtedly, Nancy Calloway appears to have considered that her two-fifths interest in the land was equal to sixteen acres; and the fifth and sixth findings show that she sold this sixteen acres to her daughter Amanda, and Amanda's two children, the sixteen acres being taken off the west side.

By partition and repurchase, as shown in findings seven and eight, the title to these sixteen acres again vested in Nancy Calloway, leaving her interest in all the land just the same as it was when she purchased the undivided two-fifths from George and Amanda, as shown in findings three and four.

Findings nine and ten show that she again sold this sixteen acres to the appellant. Whatever title, therefore, Nancy Calloway had in the sixteen acres passed by her warranty deed to appellant, who still owns it.

If Nancy Calloway had attempted to sell the whole forty acres, it is clear enough that her deed would convey only her interest, which, as we have seen, consisted of her life estate, and of an undivided two-fifths of the fee simple. Certainly, when she attempted to convey the sixteen acres, on the theory, apparently, that she was the full owner of it, she could also convey only her life estate in it, together with her undivided two-fifths interest in the fee simple.

A cotenant can not, by his own deed, and without the co-operation of the other cotenants, proceed to select and dispose of his own several interest in the common property. The interests of Nancy Calloway's cotenants in the sixteen acres conveyed by her remained the same after her deed as before. Her making a deed for the land could not disturb their title to the same land.

Nancy Calloway's deed to appellant for the sixteen acres off the west side of the forty acres, therefore, con-

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veyed only her life estate in that parcel, together with an undivided two-fifths interest in the fee simple.

From finding eighteen, it appears that Nancy Calloway conveyed to appellee, January 28, 1886, the undivided two-fifths of the forty acres. As this deed was later than the deed conveying her interest in the sixteen acres to appellant, as shown in findings nine and ten, it is evident that the deed for the two-fifths of the forty acres so conveyed to the appellee Cassie, covered only Nancy Calloway's interest in the twenty-four acres off the east side.

As the deed of January 28, 1886, was not placed on record until July 11, 1892, it may be that the deed of August 10, 1886, shown in finding twelve, by which Nancy Calloway again attempted to convey her undivided interest in all the land gave good title for such interest to her daughter Amanda, as a purchaser without notice of the previous unrecorded deed for the same interest to appellee.

However that may be, the title of appellee to a two-fifths interest in the twenty-four acres off the east side is good also through the said deed to Amanda; for taking findings twelve, thirteen and sixteen, it is shown that, through Catherine Busch and Amanda, the title of the appellee Cassie is good to all the interest of Nancy Calloway in the twenty-four acres.

Other deeds shown in the findings did not in any manner disturb the title of appellant to her two-fifths interest in the sixteen acre tract, or that of the appellee to the same interest in the twenty-four acre tract, as derived from the remote grantor of each, Nancy Calloway.

Counsel for appellant dwell at length upon the fact found in the ninth and tenth items, that Nancy Calloway, by what is shown by finding twenty-five to have been a warranty deed, conveyed to appellant the sixteen

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acre tract; and, as finding twenty-four shows that the land was of uniform value, and the sixteen acres therefore, equal in value to Nancy Calloway's two-fifths interest, it is plausibly argued that her conveyance carried the full fee in the sixteen acres.

Nancy Calloway, however, could not herself make partition of her interest in the forty acres. In conveying the sixteen acres she could not convey a greater interest in the same than that which she possessed. There is no available error in the record.

The judgment is affirmed.

Filed Oct. 31, 1894.

 No. 16,990.

SHEDD v. DISNEY ET AL.

QUIETING TITLE.—Necessary Party.—Judgment.—The holder of a tax sale certificate is not a necessary party to a suit by one claiming under a prior tax deed to quiet title as against the original owners of the land and a decree quieting title in such suit is not void as to him because he is not made a party.

SAME.—Transfer of Land Pending Suit.—Effect of.—Where, pending suit to quiet title to real estate, a part of the land is transferred by the plaintiff, the cause may, under section 271, R. S. 1881, proceed to final judgment in the name of the plaintiff, in the same manner as if there had been no transfer.

TAX SALE.—Nonresident Bidder.—Must Comply with Statute Relating to.—Illegal Sale.—A sale of land by a county treasurer to a person not a resident of this State for delinquent taxes, unless such nonresident, before bidding, shall have filed a written agreement consenting to the jurisdiction of the circuit court of the county and an appointment of a citizen of the county, as his agent, upon whom service of process may be had in any suit connected with the sale, as provided in section 8603, R. S. 1894, is illegal.

JUDGMENT.—Order Subsequent to Final Judgment.—Review of on Appeal.—Withdrawal of Deposit to Secure Costs.—An order made after the rendition of the judgment from which the appeal is taken, and

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which does not affect the judgment, such as an order allowing a party to withdraw from the clerk money deposited as security for costs, is not available on appeal.

From the Porter Circuit Court.

W. E. Pinney, for appellant.

A. D. Bartholomew, for appellees.

COFFEY, J.—This action was commenced in the Porter Circuit Court by the appellee Disney against the appellant, Shedd, and others, to quiet title to the land described in the complaint.

Shedd, in addition to filing an answer consisting of the general denial, filed a cross-complaint in which he sought, amongst other relief, to quiet title in himself to the same land. A trial of the cause by the court resulted in a special finding of the facts proven on the trial with the court's conclusions of law thereon, upon which a decree was entered in favor of the appellee Disney.

The assignment of error calls in question the correctness of the court's conclusions of law on the facts found.

The facts in the cause necessary to a decision of the questions discussed by counsel are as follows: Both the appellant, Shedd, and the appellee Disney, claim title to the land in dispute under John Peters and Edwin Hoxie, who acquired it as tenants in common by patents from the State of Indiana. On the 12th day of February, 1878, James G. Smith purchased the land at a tax sale made to satisfy delinquent taxes, and, on the 19th day of February, 1880, he received a tax deed from the auditor of Porter county. He subsequently transferred his interest to Frank H. Morrical, who instituted suit in the Porter Circuit Court to quiet the title, but the court found that the deed to Smith was insufficient to convey the title, and he thereupon took a decree to sell the land

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for the payment of the amount found due him. The land was sold on this decree and bid in by Morrical, but the description in both the decree and order of sale was erroneous.

On the 1st day of August, 1883, Morrical conveyed the land, by warranty deed, to J. S. McKinney and E. S. Bean, and, on the 25th day of December thereafter, McKinney conveyed the undivided half of it to Bean. On the 28th day of April, 1891, Emma S. Bean instituted suit, in the Porter Circuit Court, against Peters and Hoxie and others to quiet her title, in which she was successful, and the court entered a decree quieting her title to the land as against them and their heirs. The court also appointed a commissioner to execute a deed conveying to her the title of Peters and Hoxie, which was done. On the 25th day of September, 1891, Bean conveyed the land to the appellee Robert S. Disney by warranty deed, who platted the same as town lots, and has sold and conveyed a large number of such lots to purchasers.

On the 11th day of February, 1889, the appellant, Charles B. Shedd, purchased this land at tax sale for the sum of \$6.81½, and, on the 25th day of June, 1891, he received a tax deed from the auditor of Porter county. On the 15th day of May, 1890, he paid taxes on the land to the amount of \$2.62.

Prior to the commencement of this action, Emma S. Bean tendered to the appellant \$17 in redemption from his purchase at tax sale, which was a sum in excess of the amount due him if she was entitled to redeem. The tender was kept good by bringing the money into court for the use of the appellant. All of the parties to this controversy are now, and always have been, nonresidents of the State of Indiana.

The appellant did not file the agreement required by

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section 8603, R. S. 1894, but, without such agreement, the treasurer received his bid and struck off and sold the land to him.

It will be seen, from an examination of the above statement of facts, that the appellee Robert S. Disney makes a perfect chain of title from the State of Indiana to himself. Prior to the action by Mrs. Bean against Peters and Hoxie to quiet title, her title would seem to have been imperfect, unless the tax sale to Smith was valid, but by that action she obtained the evidence of the fact that she held the then title. Neither Peters nor Hoxie can assert any claim to this land as against Mrs. Bean while the decree in her favor against them remains in force.

The appellant claims that this decree is void as to him because he was not made a party to that suit, but we do not think he was a necessary party. At the time that suit was instituted, he had not yet received a tax deed, but if he had, that suit involved a controversy between Mrs. Bean on one side, and Peters and Hoxie on the other, in which the appellant had no interest. The case, in its legal aspect, is not different from what it would have been, had Peters and Hoxie executed a conveyance to Mrs. Bean instead of permitting her to take a decree quieting title.

This brings us to the question as to whether the appellant, by his purchase at a tax sale, acquired a title to this land and thereby divested the title of the appellee.

It has been repeatedly held in this State that whoever asserts a title through a tax deed, takes upon himself the burden of showing that every step required by law to be taken from the listing of the land for taxation to the delivery of the deed, has been regularly taken. *Gavin v. Shuman*, 23 Ind. 32; *Ellis v. Kenyon*, 25 Ind. 134;

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Steeple v. Downing, 60 Ind. 478; *Kraus v. Montgomery*, 114 Ind. 103; *Bowen v. Swander*, 121 Ind. 164.

It is contended by the appellant, however, that the rule established by the above cases is abrogated by section 6480, R. S. 1881, which provides that a tax deed shall be *prima facie* evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in the grantee in such deed.

We deem it unnecessary to inquire, in this case, whether the appellant is right or wrong in this contention, for, assuming, without deciding, that he is right, the *prima facie* case made by his deed is destroyed by the special finding of facts.

Section 8603, revision of 1894, provides that no bid shall be received from any person not a resident of the State of Indiana, until such person shall file with the treasurer an agreement, in writing, consenting to the jurisdiction of the circuit court of the county in which such sale shall be made, and also filing with such treasurer an appointment of some citizen of the county, as agent of the purchaser, and consenting that service of process on such agent shall give such court jurisdiction to try and determine any suit growing out of or connected with such sale for taxes.

The sale by the treasurer of Porter county to the appellant was made in total disregard of this statute. If the treasurer could not legally accept a bid from the appellant, by reason of his being a nonresident of the State, it seems plain that he could not legally sell him the land.

It is further contended by the appellant that the appellee was not entitled to a decree quieting his title because he had parted with his interest in the land before the decree was entered.

This contention can not be maintained because section

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271, R. S. 1881, expressly provides that in case of the transfer of the subject-matter of the action pending suit, the cause may proceed to final judgment in the name of the plaintiff, in the same manner as if there had been no transfer. The decree was entered with reference to the conditions as they existed at the time of the commencement of this suit.

Finally, it is contended by the appellant that the circuit court erred in permitting the appellee to withdraw money deposited with the clerk as security for costs. This, however, occurred after the rendition of the decree from which this appeal is prosecuted, and does not, in any manner, affect the judgment. Furthermore, no action was taken by the appellant, or objection made in the court below, and there is, therefore, nothing for us to review.

There is no error in the record for which the decree of the circuit court should be reversed, and the same is, therefore, affirmed.

Filed Nov. 13, 1894.

No. 17,022.

THOMAS v. TOWN OF BUTLER ET AL.

STATUTE.—Revision and Substitution.—Repeal by Implication.—Where a new act covers the whole subject-matter of an old one, and it is evident that the Legislature intended to revise the old act, and substitute therefor the new, the prior act is thereby repealed without any express words to that effect.

SAME.—Agricultural Lands Within Town or City.—Taxation of.—Repeal of Statute.—The act of April 16, 1881 (Acts 1881, p. 698), relating to the taxation of agricultural lands lying within the limits of a city or incorporated town, being a revision of, and intended as, a substitute for the act of March 21, 1879 (Acts 1879, p. 94), upon the

139	245
145	247
146	242

139	245
149	48

139	245
170	327
170	491

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same subject, operated to repeal the last mentioned act, and the express repeal of the act of 1881 by the act of March 9, 1891 (Acts 1891, p. 398), extinguished both of the prior acts, and such lands thereafter were subject to taxation by a town or city as other property.

From the De Kalb Circuit Court.

W. L. Penfield, for appellant.

J. E. Rose, C. J. Coats and J. H. Rose, for appellees.

MCCABE, J.—The appellant has 138 acres of land within the corporate limits of the appellee, which is not platted as town property and which is a farm used exclusively for agricultural purposes and not dedicated for corporate purposes.

The complaint sought to enjoin the collection of a portion of the tax levied thereon by the corporation for the year 1891. In addition to the facts above stated, it was alleged that the aggregate percentage of levy in Wilmington township, wherein said lands and town are situate for township, special school, road, and special road purposes was 25 cents on the \$100 of the assessed valuation of property for taxation. And that the aggregate levy in said town for said year, for municipal, road, school, and water works tax was 97 cents on the \$100 of assessed valuation of property; that the tax levied on her said lands by said town for said year was 97 cents on the \$100; that the town is threatening to collect all of said tax; that appellant had tendered to said town \$46, which is equal to the aggregate percentage levied for township, special school, local tuition, and road purposes in the civil township of Wilmington on the assessed valuation of her land had it been outside of said corporation; that said town had refused said tender and was threatening to collect the whole of said tax so levied by it on her said lands. She brought the money into court and deposited it with the clerk to keep her tender

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good, and she prayed a perpetual injunction against the forced collection of the balance of said tax.

The circuit court sustained a demurrer to the complaint for want of sufficient facts, which ruling is assigned as the only error.

The question thus presented depends upon whether the act approved March 21, 1879, still remains in force. Acts 1879, p. 94. Appellant contends that it does, while appellee contends that it has been superseded and repealed.

The first section provides: "That lands lying within the limits of any city or incorporated town in this State, that are not platted as city or town property, and are not used for other than agricultural purposes, or are wholly unimproved, and that have not in any way been dedicated for corporation purposes, together with all articles or chattel property used for the purpose of farming on such lands, shall not be taxed for general city or town purposes at any higher aggregate percentage on the appraised value of the same than the aggregate percentage levied for township, special school, local tuition and road purposes in the civil township wherein such property is situated: *Provided, however,* That the provisions of this act shall not apply to parcels of land containing less than five acres."

The second section repeals all laws "in conflict with the provisions of this act," and the third and last section declares an emergency for the immediate taking effect of the act.

The Legislature passed an act, which was approved April 16, 1881 (Act of 1881, p. 698), the first section of which is section 3261, R. S. 1881. This act is a literal copy of that of 1879, above mentioned, except that the words, "and that have not in any way been dedicated for corporation purposes," have been left out of the last

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act; and instead of the words, "all articles or chattel property used for the purpose of farming on such lands, shall not be taxed for city or town purposes at any higher aggregate, etc.," are substituted by the words, "all personal property used for the purpose of farming on such lands shall not be taxed in such city or town, for all purposes, at a higher aggregate, etc."

The act of 1881 was expressly repealed by the Legislature in an act passed for that sole purpose, approved March 9, 1891, Acts of 1891, p. 398.

The question thus arises, did the act of 1881 repeal the act of 1879? The appellant contends that it did not, but simply continued it in force, and that she is entitled to the exemption therein provided for, while the appellant contends that the act of 1879 was repealed by the act of 1881, and that the latter act was repealed by the act of 1891, above referred to, thus leaving no statute in force exempting appellant's lands from the percentage of levy of taxes, to which other property is subject within the corporate limits.

Appellant, in support of her contention that the act of 1879 is not repealed, cites *Cordell v. State*, 22 Ind. 1; *Alexander v. State*, 9 Ind. 337, and *Martindale v. Martindale*, 10 Ind. 566, to the effect that the reenactment of an existing provision of law does not necessarily repeal such former provision; and many authorities are cited by her to the effect that repeals by implication are not favored. *City of Evansville v. Summers*, 108 Ind. 189; *Coghill v. State*, 37 Ind. 111; *Jeffersonville, etc., R. R. Co. v. Dunlap*, 112 Ind. 93.

It may well be conceded that the law thus stated is well settled, but that leaves the question yet undetermined whether the act of 1881 repealed that of 1879.

It is also well settled that where a new statute covers the whole subject-matter of an old one, adds new pro-

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visions, and makes changes, and where such new law, whether it be in the form of an amendment or otherwise, is evidently intended to be a revision, and to take the place of the old, it repeals the old law by implication. *Hadley v. Musselman*, 104 Ind. 459; *State, ex rel., v. Board, etc.*, 104 Ind. 123; *Wagoner v. State*, 90 Ind. 504; *Longlois v. Longlois*, 48 Ind. 60; *President, etc., R. R. Co. v. Bradshaw*, 6 Ind. 146. But appellant insists that the new statute can not work a repeal of the old by implication, unless there is a conflict or repugnance between the provisions of the two acts that is irreconcilable; that is the well recognized rule where the repeal results alone from such repugnance or conflict. *Coghill v. State, supra*; *City of Evansville v. Summers, supra*; *Jeffersonville, etc., R. R. Co. v. Dunlap, supra*.

Where, however, the new act covers the whole subject-matter of an old one, and it is evidently intended thereby to revise the old act, and that the new act shall take the place of the old, then the old law is repealed because the circumstances evince an intention that the old law in the form it was is no longer to exist. *Dowdell v. State*, 58 Ind. 333; *State v. Mason*, 108 Ind. 48; *State, ex rel., v. Board, etc., supra*; *Sutherland Stat. Con.*, section 154.

The section of *Sutherland* above cited says: "Revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute; it displaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is continued in operation

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as it may operate in the connection in which it is re-enacted. In *Bartlett v. King*, DEWEY, J., said: 'A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on principles of law, as well as in reason and common sense, operate to repeal the former.' Though a subsequent statute be not repugnant in all its provisions to a former, yet if it was clearly intended to prescribe the only rule which should govern, it repeals the former statute. Without express words of repeal a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern. * * *

Does a revision import that it shall displace the last previous form; that it is evidently intended as a substitute for it; that it is intended to prescribe the only rule to govern? In other words, will a revision repeal by implication previous statutes on the same subject, though there be no repugnance? The authorities seem to answer emphatically, yes. The reasonable inference from a revision is that the Legislature can not be supposed to have intended that there should be two distinct enactments embracing the same subject-matter in force at the same time, and that the new statute, being the most recent expression of the Legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law."

There can be no doubt that the act of 1881 was designed, and intended as a revision of the act of 1879 in a corrected or improved form. This is evident from the fact that the body of the new act is an exact copy of the old in every respect except in the particulars already

mentioned, wherein the form has been attempted to be improved.

The improvement evidently intended was to leave out the qualification of the right to the exemption, excluding therefrom agricultural lands dedicated to corporation purposes; but principally the intended improvement consists in changing from the provision that the property mentioned "shall not be taxed for general, city or town purposes at any higher aggregate percentage on the appraised value of the same than the aggregate percentage levied for township, special school, local tuition, and road purposes in the civil township wherein such property is situated," so that the provision reads: "Shall not be taxed in such city or town for all purposes at a higher aggregate percentage upon the appraised value thereof than the aggregate percentage of the tax levy in the civil township wherein such property is situated."

The evident purpose of this provision was to prevent lands within the corporate limits of any town or city, used exclusively for agricultural purposes, from being taxed at a higher rate for all purposes, in the aggregate, than it would have been subject to had it remained outside of such corporate limits. Whether that was the intention of the first act is not made quite clear by its provisions.

A strict and literal reading of the act of 1879 would, perhaps, permit the city or town to levy for general, city, or town purposes an aggregate percentage on the appraised value of the same equal to the aggregate percentage levied for township, special school, local tuition, and road purposes in the civil township wherein such property is situated. And for at least some of these purposes such property would be liable to assessment in the corporation in addition to the aggregate percentage al-

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ready mentioned, thus making it liable to a greater aggregate rate of taxation than other property within the corporation. Thus it is that the peculiar wording of the first act, if literally carried out, would defeat what must have been the original purpose of the Legislature. It must have been the purpose and intent of the revising act of 1881 to remove the possibility of such a result, and make it clear and plain that such property could not be taxed at a higher rate for all purposes in the aggregate than it would have been subject to had it never been brought within the corporate limits. The chief object of the new act was to accomplish that result. That clearly was a revision of the old act by stating it in a corrected or improved form, and was clearly intended to take the place of the old act. Nothing could be farther from a rational intent on the part of the Legislature than that both acts should stand as the law. It is true, as stated by some of the authorities above mentioned and cited by appellant, that so far as any operative part of the old act has been brought forward and reënacted by the new act, it is not repealed, and is, as stated by Sutherland, continued in operation, as it may operate in the connection in which it is reënacted. It has been frequently held in this and other courts, that the reënactment of a statute does not operate as a repeal of the former law, but that the effect of the new act is to continue the old act in force. *Gorley v. Sewell*, 77 Ind. 316, and cases there cited; *Reynolds, Audr., v. Bowen, Admr.*, 138 Ind. 434, and numerous authorities there cited.

And that is the very contention of the appellant. But how does it continue the old act in force? It is continued in force in the new act, and not in the old. Otherwise there could be no revision of a law or laws without interminable confusion as to what the law is at any given time.

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In the revision of laws it is often essential to bring forward into the new act many operative portions of the old statute without change or modification, and it is often of the utmost importance to public and private interests that the continuity of the operation of the reënacted statute shall not be broken by the reënactment thereof. To hold the operation of the reënacted statute broken by the reënactment is to hold, in many cases, that public interests and private rights are swept away beyond the possibility of repair. The principle upon which the continuity of operation of the reënacted statute rests is the manifest legislative intention.

It would be exceedingly unreasonable to suppose that the Legislature, in reënacting operative portions of a statute, intended thereby to break the continuity of its operation. When they bring forward into the new act such operative portions of the old act, they thereby indicate the legislative will and intent that such provision shall continue to be the law, not that it shall cease to operate, but that its operation as the law shall continue as before. But that does not indicate an intention to continue it in force in the old law, but to continue it in force in the new law as the only rule in the cases covered by the new act. The old law has been superseded and displaced, and as such has been repealed by the new act. Therefore, all of the act of 1879, left in force by the act of 1881, was merged in and formed a part of the latter act, and when it was expressly and unconditionally repealed, as we have seen, by the act of 1891 both acts were effectually repealed and extinguished.

There was, therefore, no law in force making a different rule for the assessment of appellant's farm lands within the corporate limits of the town of Butler than that applicable to other property within such limits at the time the assessment complained of was made. This

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leads to the conclusion that the complaint did not state facts sufficient to constitute a cause of action, and that the circuit court did not err in sustaining the demurrer to the complaint.

The judgment is affirmed.

Filed Nov. 15, 1894.

No. 16,880.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v.
WEST, TREASURER, ET AL.

TAXES.—Law of 1891.—Constitutionality of Act.—State Tax Board.—Cases Followed.—The questions presented by the complaint in this case as to the powers, duties, privileges and procedure of the State Board of Tax Commissioners under the act of March 6, 1891 (Acts 1891, p. 199), and as to the constitutionality of said act, are the same as those decided in *Cleveland, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 513; *Indianapolis, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 609; *Pittsburgh, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 625; which cases are here followed.

SAME.—Delinquent Taxes.—Penalties and Interest.—Law of 1891 Construed.—Under the tax law of March 6, 1891 (Acts 1891, p. 199), considering it as a whole, nonpayment of the April installment carries into delinquency the whole tax, to which is added a penalty of ten per centum; if such taxes are not paid, but are still delinquent in November, an additional burden of six per centum thereon is imposed; if the April installment is paid, and only the November installment is delinquent, but ten per centum can be added; and to these penalties no additions can be made in the way of either penalties or interest, however long the delinquency continues.

SAME.—Payment "On Account."—Effect of Such Payment.—Where, within the time for paying the April installment of taxes, a payment is made to the treasurer equal to such installment, with instructions to apply the same "on account," the law is complied with, and the whole tax does not become delinquent, though the sum paid is not actually applied to April installment. It is otherwise, however, if a sum less than such installment is paid.

From the Gibson Circuit Court.

139	254
146	60
139	254
154	217

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J. E. Iglehart and E. Taylor, for appellant.

A. G. Smith, Attorney-General, *J. W. Kern*, *L. O. Bailey*, *W. A. Ketcham*, *S. R. Hamill*, *W. W. Ireland*, *W. D. Robinson*, *J. T. Beasley* and *A. B. Williams*, for appellees.

HACKNEY, C. J.—The appellant sued the appellees, James A. West, treasurer of Gibson county, John F. Saunders, treasurer of Vanderburg county, John Walz, treasurer of Posey county, G. W. Donaldson, treasurer of Knox county, Jonathan Scott, treasurer of Sullivan county, Gus A. Conzman, treasurer of Vigo county, Ernest Mueller, treasurer of Clay county, F. H. Hoffman, treasurer of the city of Vincennes, W. W. Hauck, treasurer of the city of Terre Haute, A. C. Fogas, treasurer of the city of Mt. Vernon and John McDonough, treasurer of the city of Evansville, and sought to enjoin the enforcement of such taxes as were levied, computed and placed upon the tax duplicates of the several counties and cities named, upon the basis of valuations by the State Board of Tax Commissioners of the railroad and rolling stock of the appellant in said several counties and cities as made September 8, 1891, and in so far as the same was in excess of the valuations thereof returned by the appellant.

The lower court sustained the demurrers of the appellees to the complaint, and judgment was rendered in their favor upon failure by the appellant to plead further. That ruling is the only error presented by the record.

Upon the appeal herein, this court granted a restraining order by which the enforcement of the taxes complained of was stayed until ordered otherwise. The appellees now move the dissolution of this restraining order.

The questions presented by the complaint are identical

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with those fully considered and decided by this court, as to the powers, duties, privileges and procedure of the State Board of Tax Commissioners, created and imposed by the act of the Legislature of Indiana, approved March 6, 1891 (Acts 1891, p. 199), and as to the constitutionality of said act, in the cases of *Cleveland, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 513; *Indianapolis, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 609; *Pittsburgh, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 625, and as confirmed in said cases, upon certification to the Supreme Court of the United States, May —, 1894.

Upon the authority of those cases this case must be affirmed and the restraining order dissolved.

In addition to the questions originally presented by the complaint the parties now present for consideration certain questions as to the proper penalties or penalties and interest collectible from the appellant upon its several delinquencies in the payment of the taxes involved in this suit.

It is alleged that in some instances it is proposed to compound penalties; that in others penalties of ten per centum and of six per centum, with interest added, are demanded; that in still others such penalties, with interest compounded, are claimed, and in still others, and where, before delinquencies, payments were made, equal to or in excess of the first installment, with directions to apply the sums paid "on account," it is claimed that such installment became delinquent and that penalties attached on account thereof.'

Section 152 of the tax law, Acts 1891, p. 260, is as follows: "Any person or taxpayer charged with taxes on the tax duplicate in the hands of a county treasurer may pay the full amount of such taxes on or before the third Monday in April, or may, at his option, pay the first installment on or before such third Monday, and

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the remaining installments on or before the first Monday of November following: *Provided, however,* That all road taxes charged shall be included in the first installment: *And, provided further,* That in all cases where the first installment shall not be paid on or before the third Monday in April, the whole amount unpaid shall become due and be returned delinquent, and collected as provided by law, and there shall be a penalty added of ten per cent. upon the amount of any installment not paid when due, which the persons or property assessed shall pay, together with cost of collection, and, if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of six per centum added to all such taxes that become delinquent at the preceding April and November settlements, and a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday in November."

From this section, and other provisions of the act, it is manifest that the whole tax of any year is due on the third Monday in April succeeding, and the privilege of paying without penalty any part thereof in November thereafter is upon the condition that the first installment be paid on or before the third Monday in April. This intention is made clear by the second proviso of the above quoted section. Having paid the April installment and permitted the November installment to become delinquent, the section quoted provides a penalty against the property of ten per centum of such November installment. If the April installment is not paid, the whole tax is delinquent, and a penalty of ten per centum thereof is to be added, "and if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of six per centum added," not to the delin-

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quent taxes and penalty, but, as the act plainly states, it is "added to all such taxes as become (became) delinquent at the preceding April and November settlements."

The concluding provision of said section 152, that "a penalty of ten per centum only shall be added to the current delinquency occurring on the first Monday in November," is intended to provide a penalty where such installment only is delinquent, and is a denial of the right to add the six per centum, which is the special penalty for permitting the year's taxes to pass two paying periods without payment.

The appellant insists that the six per centum is not added until the delinquency shall have continued one full year, that is, until the next annual third Monday in April. As has been seen, we do not agree with this conclusion. The idea pervading the statute is that payments shall be made promptly, and delinquents coerced without delay, and the theory that three paying periods shall pass before the addition of the second penalty, is not tenable. We find no authority in the act for compounding the penalties, that is, for adding anew either penalty from year to year during the delinquency, nor is there any reasonable construction of the act permitting the six per centum provided by said section 152, to be calculated upon both the delinquent tax and the ten per centum thereof added as the first penalty.

As said in *Roseberry v. Huff*, 27 Ind. 12: "Taxes once delinquent remain delinquent until they are paid. It can not, in any legal sense, be said that taxes already delinquent, become delinquent at each successive year of their nonpayment."

The question as to charges of interest upon delinquent taxes is not free from doubt. The word *interest* is employed in the act, with reference to the charges upon

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delinquent taxes and the enforcement thereof, in sections 163 (p. 264 *et seq.*), 167, 169, 172, 173, 177, 180, 183, 184, 185, 187 and 191, while in sections 152, 153, 155, 156, 158 and 161 provisions are made with reference to charges against, and the enforcement of, delinquent taxes, without including any item for interest. There is no section in terms providing a rate of interest, and none declaring a charge of annual interest, simple or compound.

The attorney-general concedes that no express authority is given for the collection of interest, but he claims, as we understand him, that the charge is authorized by implication, and that the annual rate is supplied by the general statute which provides for six dollars a year on the one hundred dollars for the "forbearance of money," and "on an account stated from the date of settlement," the duplicate constituting the statement and the legally declared delinquency standing as the settlement.

Section 183 of the act provides that: "Between the first Monday of December and the first of January, annually, the county auditor shall make out and record, in a book to be provided for that purpose, a list of lots and lands, returned and remaining delinquent for taxes, * * * describing such lands or lots as the same are described in the tax duplicate, and charging them with the amount of delinquent tax, with interest and penalty of ten per centum on such taxes, also with the taxes of the current year."

Under the tax law of June 21, 1852, it was held, in *Roseberry v. Huff*, *supra*, construing a section in all respects similar to the above, that compound interest could not be charged. It was there conceded, but not decided, that the section authorized the collection of simple interest.

The section above quoted, it will be observed, directs the charge of "interest and a penalty of ten per centum

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on such taxes," omitting the six per centum penalty provided by section 152, though the time for making such charge, December, after the November delinquency has arrived. If the general interest statute does not apply, we are required to ascertain the intention of the Legislature from the numerous provisions of the act considered together.

We do not concur in the contention that the general statute supplies the rate of interest. The forbearance of money contemplated by that statute is an indulgence by the creditor and could not have included the neglect of a taxpayer. Tax collectors have no authority to forbear and the failure to pay is visited with expressed burdens only. Neither does the tax imposed by law resemble the account stated. The general statute did not contemplate the addition of interest in the nature of penalties for the failure to discharge a public duty or demand. It only provided the conditions under which contracts for interest upon forbearances would be implied. Taxes and penalties are never imposed by implication.

Our conclusion is that though the word *penalty* is employed in section 152, in providing the burden of six per centum, it was employed in the same sense as the word *interest* is employed in section 183 and other sections. This construction, whether the six per centum is imposed as interest or as penalty, gives the whole act that consistency in its provisions which it can not have by any other construction that has been suggested or that has occurred to us. Ten per centum and six per centum, therefore, are the only burdens imposed upon property, the tax upon which is delinquent and which delinquency is discharged before costs of collection are added. If we look to the six per centum provision of section 152 as supplying the rate of the charge of interest directed by section 183, the inquiry is then suggested

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as to whether that rate was intended as an annual rate. If an annual rate, the same rule would apply as in ordinary promissory obligations and the delinquency would be chargeable, each year of its continuance, with interest at the rate so prescribed. We do not believe that an annual rate was intended. If it were the necessary conclusion would be that the delinquency, in November, of the April and November installments, would be chargeable, not with six per centum, but with interest at the rate of six per centum for the period extending from April to November, or but six months, the charge being but three per centum.

If we look to section 152 as supplying the annual rate of interest, it can not be accepted as also providing a direct addition of six per centum as a penalty for the non-payment, in November, of both installments. If we accept the provisions of sections 152 and 183, together, as providing an annual rate of interest on delinquencies, we then have the unusual and complicated rule of requiring the tax duplicate to state no definite amount as due from the delinquent, but as making that amount depend upon the exact duration of the delinquency and the calculation by the treasurer, at the time of payment, of the amount of accrued interest which, when added to the tax and the penalty of ten per centum, would constitute the taxpayer's obligation. This rule would necessarily render great confusion and uncertainty in the settlements between the auditor and the treasurer. These considerations lead us to the conclusion that the Legislature did not intend to require an annual charge of interest on delinquencies, and confirm the opinion that the additions of ten per centum and of six per centum are the only additions contemplated. It is therefore immaterial whether the six per centum is added as a second penalty or as interest. As already suggested, the law

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does not contemplate delinquencies extending through a number of years, but it is required by sections 183, 184 *et seq.*, that the delinquencies of any year shall be enforced by sale of the property in February of the next year.

Delays in the performance of official duties were not contemplated, and, as we have said, every feature of the act is ruled by a purpose to induce early payments or to enforce collections without delays. We conclude, therefore, that the nonpayments in April carry into delinquency the whole tax, to which is added a penalty of ten per centum; if such taxes are not paid, but are still delinquent in November, an additional burden of six per centum is added; if the April installment is paid and the November installment is delinquent, but ten per centum can be added, and no other additions can be made, however long the delinquency continues; not so, however, as to costs of enforcing the delinquencies which are not considered by us.

One further question remains: Did payments equal to the April installments, with instructions to apply the sums paid "on account," occasion delinquencies in the April installment and consequently the tax of the whole year?

As we have said, where the first installment is paid, no delinquency arises until the failure to pay the November installment, and we think this requirement is fairly met when a sum equal to the April installment has been paid, though not actually applied to such installment. The purpose of the law is to obtain the tax, and not simply to secure penalties, and when the treasury has received a sum equal to the installment, it has no just right to insist upon more. If, however, a sum less than the amount of the April installment is paid, the condition upon which delay is granted until November has not

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been met, and the whole—less the payment—is delinquent and subject to the additions of penalty.

The judgment of the circuit court is affirmed, and the restraining order heretofore issued is dissolved.

Filed June 20, 1894; petition for rehearing overruled Oct. 18, 1894.

 No. 17,015.

139	263
166	544

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WAY BY NECESSITY.—Action to Recover.—Essential Elements.—Damages.—While injury is probably an essential element in a proceeding to establish or recover a way by necessity, yet the recovery of damages is not an indispensable accompaniment.

SPECIAL FINDING.—How Considered with Reference to Time.—Special verdicts should be read and considered with reference to the issue as tendered by the complaint and answers, and as addressed to the time when such issue was tendered, and not with reference to subsequent conditions, unless such conditions affirmatively appear to have changed the status of the parties or the facts constituting the issue.

STATUTE OF LIMITATIONS.—Possessory Action.—Private Way.—Easement.—Six-Year Statute.—In an action to recover the possession of an easement, a private way, the possession of which has been disturbed, the six-year statute does not apply. Section 293, R. S. 1894.

From the Adams Circuit Court.

S. Peterson and C. J. Lutz, for appellant.

R. K. Erwin and J. F. Mann, for appellees.

HACKNEY, C. J.—The appellant sued the appellees, Richards and Hirschey, to secure the removal of obstructions from a private way, alleged to have been placed upon said way by the appellees. The appellant expressly waives the consideration of his second paragraph of complaint, and asserts his claims for recovery under his first

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and third paragraphs of complaint. The first paragraph set up a way by necessity, and the third a way by dedication. The issue was made by a general denial, and the trial was by a jury, resulting in a special verdict upon which the court denied judgment to the appellant and sustained the appellees' motion for judgment in their favor. This action of the trial court presents the only questions for review.

The special verdict finds that in the year 1869 one John Richards owned an eighty acre tract of land in Adams county which was bounded on the south by a public highway. In that year he conveyed the north half of said tract, which was remote from any highway and had no route for ingress or egress; that said grantor, while continuing to own the south half of said eighty, so set his fence as to leave a strip of ground on the west side thereof "for the sole purpose of a way to and from" the north half of said eighty, and permitted said way to be used by his grantees. That way, with some deviations, was used by said grantees and their remote grantees, including the appellant, for a considerable time, though not definitely found. The appellees and their immediate and remote grantors purchased and occupied with knowledge of the use of said way by the appellant and his grantors, and the use of said way was not denied to the appellant until the appellee, George Richards, became the owner of the forty acre tract lying immediately west of the south half of said eighty, and the appellee Hirschey became the owner of said south half, when said appellees so adjusted their fences as to obstruct and defeat the use of said way. It is found, also, that the south sixty acres of said eighty acre tract were conveyed by said John Richards to said George Richards, and that the title of the appellant to the north twenty acres of said sixty, and the title of the appellee Hirschey to the south

forty acres of said sixty acres, were derived remotely through said George Richards.

It is found, also, that the appellant is damaged by the obstruction of said way, but such damage is stated as "— dollars." Much of the finding is devoted to the questions of dedication and adverse user of the way, but these questions we regard as not essential to our conclusions.

If the facts stated sustain a right of way by necessity, the judgment of the circuit court should have been for the appellant.

Boone, in his Law of Real Property, section 143, tersely defines a right of way by necessity as arising "where the owner of several parcels of land conveys one parcel which is surrounded by others, having no way of ingress and egress but through one of those reserved. The way is so far appurtenant to the land as to pass with it to the grantee." See also *Stewart v. Hartman*, 46 Ind. 331; *Ellis v. Bassett*, 128 Ind. 118; *Robinson v. Thrailkill*, 110 Ind. 117.

The objections urged by the appellees to the finding do not question the scope of this definition, but it is insisted, *first*, that the failure to find specifically the amount of damage sustained by the appellant was fatal; *second*, that the finding that the appellant "is now" the owner of the tract remote from the highway is not equivalent to a finding that he owned at the commencement of the suit; *third*, that the finding does not take the case out of the six years' limitation of actions "for the use" of real property; *fourth*, that the finding shows simultaneous conveyances of the north twenty acres and the south sixty acres by John Richards, and, therefore, shows no estate reserved to which the easement could attach. The sufficiency of the complaint is also attacked, but no cross error is assigned.

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As to the first proposition we may say that while injury is probably an essential element in a proceeding to establish or recover a way by necessity, yet the recovery of damages is not an indispensable accompaniment.

The jury found that no other way existed for the use of the appellant, and that fact was sufficient to establish the necessity, without reference to the extent of damage, if any, sustained.

As to the second proposition, such facts appear from the verdict, in addition to the facts already stated, that if it were necessary to a recovery that appellant should have shown affirmatively an ownership by him at the bringing of his suit, we should find that the conclusion of such ownership was a necessary deduction from such additional facts, namely, prior purchase, improvement, continued use, injury by the obstruction, and that he still owned to the time of the verdict. However, we do not hold that such fact must have been affirmatively found. Special verdicts should be read and considered with reference to the issue as tendered by the complaint and answers, and as addressed to the time when such issue was tendered, and not with reference to subsequent conditions, unless such conditions affirmatively appear to have changed the status of the parties or the facts constituting the issue.

As to the third proposition of the appellees it is manifest that they misapply the statute of limitations, section 292, R. S. 1881; section 293, R. S. 1894. An action for the "use, rents, and profits of real property" is limited to six years, but the present action was for neither use, rents, or profits. The right asserted by the appellant was the ownership of an interest in land, an easement, in the possession of which he had been disturbed. The action was essentially of a possessory character.

The fourth of appellees' propositions is made upon

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too narrow a view of the record. The verdict finds that while the south sixty acres of the eighty were conveyed to the appellee George Richards on the same day that the north twenty acres were conveyed to Ellen Richards, the tract was conveyed and held in trust for said John Richards, and was thereafter held and occupied by said John, and subsequent conveyances thereof were made to his use and benefit. However, if this were not true, the easement in a way by necessity—from the north twenty of the sixty so conveyed to and held by the appellee George Richards, and thereafter conveyed through mesne conveyances to the appellant—would be as important and as readily enforceable as if it had originated from the conveyance of said John Richards. In either view of the findings, there is no merit in appellee's fourth proposition.

Disregarding the element of dedication, presented by the third paragraph of complaint, we are unable to agree with the position that the special verdict does not sustain a right of recovery, in the appellant, of a right of way by necessity, and, in our opinion, the lower court erred in sustaining the motion of the appellees for judgment on the verdict.

The judgment of the circuit court is reversed, with instructions to sustain the appellant's motion for judgment on the verdict.

Filed Nov. 20, 1894.

The Board of Children's Guardians of Marion County v. Shutter.

No. 16,974.

THE BOARD OF CHILDREN'S GUARDIANS OF MARION
COUNTY v. SHUTTER.

BOARD OF CHILDREN'S GUARDIANS.—*Collateral Attack.*—*Habeas Corpus.*

—*Jurisdiction.*—In a proceeding for the custody of an infant child by the board of children's guardians, if the circuit court has jurisdiction over the subject and the parties, though it committed the greatest irregularities and errors, its judgment can not be collaterally impeached therefor by a *habeas corpus* proceeding.

SAME.—*Power of Court Over Infants, etc., to Appoint Guardians.*—*Statutory Authority.*—*Jurisdiction.*—The power conferred by statute upon the circuit courts to appoint guardians for infants, lunatics and idiots, is merely declaratory of the chancery powers they already possessed.

SAME.—*Court.*—*Jurisdiction of Person of Infant.*—*Notice to Parents.*—In a proceeding by a board of children's guardians for the custody of a child thirteen years old, where notice of the proceeding has been duly given the father and mother of the child, the court has acquired jurisdiction of the infant without serving notice of the proceeding upon it, other than taking it into custody by the proper officer.

SAME.—*Errors in Proceeding for Custody of Child.*—*Relief Against as in Other Proceedings.*—If errors are committed in a proceeding by such board for the custody of a child, relief therefrom must be sought just as in any other proceeding—by appeal, bill of review, or any other method known to the law for relief against erroneous judgments.

From the Marion Superior Court.

W. P. Fishback, B. K. Elliott, W. F. Elliott, S. P. Davis, C. L. Hare and C. Martindale, for appellant.

J. F. McCray and S. Ashby, for appellee.

MCCABE, J.—The appellee applied to the court below for a writ of *habeas corpus* against appellant, charging it with unlawfully restraining her of her liberty; an exception to the amended return to the writ by appellant was taken by appellee, and sustained by the trial court,

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to which ruling appellant excepted, and failing to further amend its return, and electing to stand thereon without further pleading or action, it was adjudged that the alleged holding and detention of the appellee was without authority of law, etc.

The return—after reciting in detail the appointment of all the members of the Board of Children's Guardians by the circuit court of Marion county from the organization of the board to that time, giving the names of all the present members as well as their predecessors—reads as follows: "That acting as such corporation as aforesaid, of which the parties whose names have been hereinbefore set forth are members, said corporation on the first day of March, 1893, in the January term for the year 1893, of the Marion Circuit Court, filed in said court a petition as follows:

IN THE MATTER OF }
 GERTRUDE SHUTTER, } INFANT. PETITION FOR CUSTODY.

To the Honorable Judge of the Marion Circuit Court:

The Board of Children's Guardians of Marion county, a corporation existing under, and acting by virtue of, the laws of Indiana, respectfully petition the court, and say that Gertrude Shutter is a female child of 13 years of age; that the father of said child is Shade A. Shutter, residing at Jeffersonville, Indiana; that the mother of said child is Bell Shutter, residing at 249 ½ W. South street, within Marion county, Indiana; that the child is in the actual custody and control of her mother, the said Bell Shutter; that the father of said child has abandoned his family; that said mother is in constant habits of drunkenness, and low and gross debauchery; that said child is neglected, and kept in associations which tend to her corruption and contamination. Wherefore the Board of Children's Guardians of Marion county petitions the

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court to order that said child be committed to the custody and control of said board.

(Signed) THE BOARD OF CHILDREN'S GUARDIANS.

By NATHANIEL A. HIDE, *President.*

C. L. HARE, *Attorney for Petitioner.*

This petition was duly verified..

The court having inspected the petition ordered that the writ for the custody of said child be issued thereon, and that the same be served upon Bell Shutter, the mother of said child, in Indianapolis, and Shade A. Shutter, at Jeffersonville, Clark county, Indiana, and directed that said minor child should be kept in the keeping of said board until the final order of the court upon said petition. Said writs were issued thereon, and the said Gertrude Shutter was taken by the sheriff of Marion county on said writ, and delivered to the defendant, said corporation. Said petition was set for hearing on the 11th day of March, 1893, and notice thereof was ordered to be given to said Bell Shutter and Shade A. Shutter, the parents of said child, and on the 4th day of March, 1893, by agreement of both parties, said Marion Circuit Court proceeded to hear and determine said cause on said petition; and having heard the evidence, and being sufficiently advised, said court entered in said cause the following order and decree, to wit: And afterwards to wit:

On Saturday, the 4th day of March, 1893, the same being the fifty-fourth judicial day of the January term, 1893, of the Marion Circuit Court, the following additional proceedings were had in this cause: "Comes the Board of Children's Guardians of Marion county, Ind., by C. L. Hare, its attorney, and comes also Shade A. Shutter, in person, and by J. F. McCray, his attorney, and defendant Bell Shutter, in person, comes also, and now, by agreement of all parties, notwithstanding the

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return day of the writ issued herein, this cause is submitted to the court for trial, finding, and determination; and the evidence and argument of counsel having been heard, and the court having seen and inspected the petition herein, and being fully advised, finds that the allegations of said petition should be sustained; that said Gertrude Shutter is a female child of the age of 13 years, and that she should be given to the custody of the Board of Children's Guardians. It is therefore considered and adjudged by the court that the said Gertrude Shutter be, and she is hereby given to the custody of the Board of Children's Guardians of Marion county, Ind."

The return further shows that there was a motion for a new trial of said cause overruled, and a motion to modify the order was also overruled.

The return further shows this judgment of said circuit court remains in full force, unmodified, unreversed and not appealed from.

If that judgment is valid, the return was good, and the superior court in general term erred in affirming the judgment in special term adjudging the return insufficient.

It is earnestly insisted by appellee that the judgment of the circuit court in awarding her custody and control to appellant was void, because, it is asserted, the act approved March 9, 1889 (Acts 1889, p. 261), as amended by the act approved March 9, 1891 (Acts 1891, p. 365), as amended by the act approved March 3, 1893 (Acts 1893, p. 282), under which the circuit court proceeded, is in conflict with several provisions of the State constitution.

It is maintained with earnestness and ability, for appellee, that "All judgments had and rendered under a law that is unconstitutional, are void, and are as if no proceeding or judgment had been had or rendered."

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Conceding that proposition, and yet counsel's contention is not established if the law which gives the sole power or jurisdiction to the court to render the judgment is unconstitutional and void; and if, without such a law in force, the court would have no power to render the judgment in question, then, the law being void, the judgment depending wholly on such void law would also be void. Where, however, the court has jurisdiction to adjudicate upon the subject, derived from other sources than the supposed void statute, even though it may attempt to follow that statute, it does not necessarily follow that its judgment is void.

A judgment founded on a statutory bond, depending for its validity wholly on the statute, which is unconstitutional and void, is not void, and can not be collaterally impeached because the statute is unconstitutional and void. *Cassel v. Scott*, 17 Ind. 514.

If the circuit court had jurisdiction over the subject and the parties, though it committed the greatest irregularities and errors, its judgment can not be collaterally impeached therefor, as this proceeding attempted to do. *Davidson v. Koehler*, 76 Ind. 398; *Sauer v. Twining*, 81 Ind. 366; *State, ex rel., v. Morris*, 103 Ind. 161.

The circuit court was a court of general jurisdiction. If it was not clothed with all the jurisdiction of the English court of chancery, it is within a branch of the equity powers of the circuit courts of this State that they have the superintendence of infants, idiots and lunatics. *McCord, Err., v. Ochiltree*, 8 Blackf. 15.

The power to appoint guardians for infants, idiots, and lunatics, conferred by the statute, is merely declaratory of the power they already possessed. *Garner v. Gordon*, 41 Ind. 92; *Child v. Dodd*, 51 Ind. 484; *Nealis, Admr., v. Dicks*, 72 Ind. 374; *Board, etc., v. Rogers*, 55 Ind. 297; *Erskine v. Whitehead, Err.*, 84 Ind. 357; *McKenzie v.*

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State, ex rel., 80 Ind. 547; *McGlennan v. Margowski*, 90 Ind. 150; *Bryan v. Lyon*, 104 Ind. 227.

We, therefore, hold that the circuit court had ample power to deal with and adjudicate upon the subject of the guardianship, custody and control of minors. The circuit court, therefore, had jurisdiction of the subject.

It is earnestly contended that the circuit court acquired no jurisdiction over the person of the appellee, the minor, whose custody and control was determined by the adjudication. If that is true, the judgment would be void, the same as if jurisdiction over the subject was wanting. The ground upon which this contention is based is, that there was no notice or process served on the infant, notifying her that such an adjudication affecting her was to take place. No notice appears to have been served upon her, except taking her into custody by the appellant before the hearing of their petition. But there was process served on her mother and father, and a full opportunity afforded them to be heard against the granting of the petition, and they appeared at the hearing. But it is ably contended that that is not sufficient to confer jurisdiction over the person of the child.

In some of the States no other notice than notice to parents, or, if no parents, next of kin is required to enable courts to appoint a guardian.

Counsel for appellee have referred us to a large number of cases holding that a summons must be served on an infant the same as an adult, or the judgment will be void as to such infant. And in that class of cases it will be equally so if the infant was but a week old and would be as unconscious of the reading of the summons to it as a block of wood, and yet the law imperatively requires the service of such a summons on such an infant in that class of cases as much as upon an adult, or the adjudica-

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tion will be void for want of jurisdiction over the person. But the class of cases they have referred us to, and that we have been discussing, is such only as where the judgment sought or the adjudication to be had is to deprive the infant of some property right, or to injuriously affect such minor in its rights of property. In that respect its rights are precisely the same as an adult; hence it must have the summons read to it precisely the same as an adult, though it does not understand a word of it. Its right to control its own actions is not like an adult.

It is subject either to parental control, the guardian's control, or the control of the court or chancellor, in the absence of parent or guardian, on account of its lack of discretion and knowledge sufficient to guide its own actions for its own best interests. Hence, in a proceeding for the appointment of a guardian for it, the principle of the cases above referred to have no application whatever where it is under 14 years of age. Such an appointment does not deprive it of any of its rights of property, or injuriously affect its rights in that regard. It is but an officer of the court appointed to wield the power of an arm of a court of equity, and no notice to the infant is required. *Kurts v. St. Paul, etc.*, R. Co., 51 N. W. Rep. (Minn.) 221; *Appeal of Gibson*, 28 N. E. Rep. (Mass.) 296; *Reynolds v. Howe*, 51 Conn. 472. We therefore conclude that the circuit court had jurisdiction of the person of the infant, and the subject-matter of the adjudication. It may have erred at every step of those proceedings; we do not decide that it did or did not, because such errors and irregularities can not be inquired into on a writ of *habeas corpus*. R. S. 1881, section 1119; *Wentworth v. Alexander*, 66 Ind. 39; *Kinningham v. Dickey*, 125 Ind. 180; *Turner v. Conkey*, 132 Ind. 243; *Smith v. Hess*, 91 Ind. 424; *Lowery v. Howard*, 103 Ind. 440;

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Davis v. Bible, Sheriff, 134 Ind. 108. Such errors, if any were committed, must be relieved against just as in any other adjudication—by appeal, bill of review or any method known to the law for relief against an erroneous judgment. The conclusion we have reached not only finally disposes of this case in this court, but also in the court below, without deciding anything whatever about the constitutionality of the statute so ably and exhaustively discussed by counsel on both sides. Under such circumstances, our duty does not require us to enter upon that field of investigation. *Cummings, Treas., v. Stark*, 138 Ind. 94.

The judgment is reversed and the cause remanded, with instructions to overrule the exceptions to the amended return.

Filed June 15, 1893; petition for rehearing overruled Nov. 15, 1894.

No. 16,924.

TUCKER v. ROACH.

HARMLESS ERROR.—*Finding for Plaintiff on Paragraph of Complaint.*—*Errors Relating Thereto.*—Where the finding is for the plaintiff, as to a paragraph of complaint, all decisions in relation to such paragraph, whether relating to the pleadings, evidence or instructions, if erroneous, were harmless as to him.

CANCELLATION OF INSTRUMENT.—*Promissory Note.*—*Mortgage.*—*Fraud.*—*Undue Influence.*—*Complaint.*—Where a complaint, in an action to cancel and set aside a note and mortgage procured by fraud and undue influence, alleged, in substance, that the plaintiff was a feeble old man in ill health, of weak mind and in straitened circumstances, and that defendant, with full knowledge of all the facts, in bad faith, and for the fraudulent purpose of cheating and defrauding plaintiff, instituted an unfounded action against him for damages sustained in a real estate transaction between them, by reason of misrepresentations of the plaintiff; and that afterwards, by threats

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152	614
139	275
165	654

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and undue influence, defendant intimidated plaintiff, and, on account of plaintiff's old age, ill health and weak mind, induced him to execute the note and mortgage for the fraudulent purpose aforesaid,—the complaint is sufficient on demurrer.

SAME.—Consideration.—Compromise of Suit.—Fraud.—Intimidation.—Note.—Mortgage.—Where the jury find for the plaintiff on such paragraph of complaint, the finding, in effect, was that the note and mortgage were without consideration, were procured by fraud and intimidation, and that the suit compromised was not a good cause of action, nor brought in good faith; and, therefore, the amount agreed upon in the compromise was not a sufficient consideration for the note and mortgage.

SAME.—Evidence.—Financial Condition.—Fraud.—Intimidation.—Mental and Physical Condition.—In an action to cancel a note and mortgage alleged to have been procured by fraud and intimidation, the fact that the plaintiff was, at the time of their execution, in straitened circumstances, added to old age and feebleness of mind and body, is certainly an element that may be taken into consideration in determining whether he was overreached in a fraudulent contract.

From the Hamilton Circuit Court.

T. J. Kane and L. O. Clifford, for appellant.

W. Neal and J. F. Neal, for appellee.

HOWARD, J.—This was an action brought by the appellee for the cancellation of a certain note and mortgage given by the appellee to the appellant. The complaint was in three paragraphs.

In a former transaction appellee had exchanged with appellant a farm in Missouri, together with certain personal property in the city of Indianapolis, for a farm in Hamilton county, in this State.

Appellee alleged in the first paragraph of his complaint, that the mortgage in suit was given upon his Hamilton county farm, and, by the terms of the mortgage, it was provided that if appellant should sell the Missouri farm within two years for more than a certain sum, such excess should be applied upon the note secured by the mortgage given by appellee. It was

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further alleged that the Missouri land was exchanged for Kansas land at such a price as to more than satisfy the condition for cancellation of the note and mortgage, but that appellant has refused to surrender and cancel the same. The paragraph also concludes with a plea of payment.

In the second paragraph of the complaint the allegation is that the note and mortgage were without consideration.

The material allegations of the third paragraph are that the appellee was a feeble old man in ill health, of weak mind and in straitened circumstances, and that the appellant, with full knowledge of all the facts, in bad faith, and without any cause whatever for so doing, and for the fraudulent purpose of cheating and defrauding the appellee, instituted an unfounded action against the appellee for damages sustained in their real estate trade through and by reason of the misrepresentations of the appellee; and that afterwards, by threats and undue influence, the appellant intimidated the appellee, and on account of his old age, ill health and weak mind, induced him to execute the note and mortgage for the fraudulent purposes aforesaid.

Other pleadings were filed and the cause was submitted to a jury, who returned a verdict for the appellee. Judgment was rendered cancelling the note and mortgage and quieting title in appellee to his Hamilton county farm.

The jury, with their verdict, returned answers to interrogatories from which it appears that the verdict was based wholly upon the second and third paragraphs of the complaint.

The numerous alleged errors made under the issues joined in the first paragraph of the complaint in relation to the pleadings, admission of evidence, and instructions,

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will not therefore be considered, inasmuch as the finding was for the appellant under that paragraph. The rulings, if erroneous, were harmless to him. *Johnson v. Ramsay*, 91 Ind. 189; *Smith v. McKean, Admr.*, 99 Ind. 101; *Barnett v. Feary*, 101 Ind. 95; *Bloomfield R. R. Co. v. VanSlike*, 107 Ind. 480; *Gebhart v. Burkett*, 57 Ind. 378; *Baker v. Carr*, 100 Ind. 330; *Ricketts v. Harvey*, 106 Ind. 564; *Woolery, Admr., v. Louisville, etc., R. W. Co.*, 107 Ind. 381; *Porter v. Waltz*, 108 Ind. 40; *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378.

It is contended that the third paragraph of the complaint is bad for the reasons that it shows an exchange of property between the parties; that an action for damages for misrepresentation in the trade was brought by appellant against appellee; that the dismissal of such action was a good consideration for the note and mortgage in this case, and consequently that the paragraph shows no right of action against appellant. We think counsel mistake the character of the paragraph in question. It shows an action to cancel and set aside a note and mortgage procured by fraud and undue influence. As such we think it good, and not subject to the demurrer urged against it.

It is next contended that the court erred in overruling appellant's motion for judgment on answers to interrogatories, notwithstanding the general verdict.

The answers to interrogatories were all made under issues tendered in the first paragraph of the complaint, except the last three, which are as follows:

"13th. Do you find for the plaintiff on the first paragraph of the complaint? Ans. No.

"14th. Do you find for the plaintiff on the second paragraph of the complaint? Ans. Yes.

"15th. Do you find for the plaintiff on the third paragraph of the complaint? Ans. Yes."

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The answers to interrogatories are, therefore, not in conflict with the general verdict, and the court did not err in overruling appellant's motion for judgment upon the answers. *Frazer, Exr., v. Boss*, 66 Ind. 1.

It is true that the compromise and dismissal of a good cause of action constitute a sufficient consideration for the execution of a note and mortgage for the amount agreed upon in the compromise. But the jury in this case, by finding for the appellee on the second and third paragraphs of his complaint, thereby, in effect, found that the note and mortgage were without consideration, and were procured by fraud and intimidation, and, consequently, that the suit compromised was not a good cause of action, nor brought in good faith.

As to instructions asked by appellant and refused by the court, and which are applicable to evidence given under the second and third paragraphs of the complaint, we think that so far as they correctly express the law as to want of consideration or fraud and undue influence in the making of contracts, they were fully supplemented in the instructions given by the court on its own motion.

The eighteenth instruction given by the court upon its own motion is objected to for the reason that the jury were thereby instructed that they might consider evidence as to the embarrassed financial condition of appellee, for the sole purpose of "illustrating and throwing light upon the plaintiff's mental condition" at the time of the making of the alleged fraudulent contract, as stated in the third paragraph of complaint.

We think the instruction correct for the purpose to which it was expressly limited. The allegations of fraud and undue influence on the part of appellant were based, in part, upon the circumstance that the appellee, at the time of the bringing of the suit for damages against him,

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and of his making the note and mortgage in compromise, was financially embarrassed. The fact that one is in straitened circumstances, added to old age and feebleness of mind and body, is certainly an element that may be taken into consideration in determining whether he was overreached in a fraudulent contract.

Similar remarks apply to the objections made by counsel to various items of evidence introduced on the trial to show the relative situations of the parties at the times of the transactions complained of.

As said in *Adams v. Irving Nat'l Bank*, 116 N. Y. 606, a well considered case in which the authorities are very fully referred to: "The principle which appears to underlie all this class of cases is, that whenever a party is so situated as to exercise controlling influence over the will, conduct and interest of another, contracts thus made will be set aside."

We find no error in the record.

The judgment is affirmed.

Filed Nov. 21, 1894.

No. 15,844.

BROWNING ET AL. v. SMITH ET AL.

SUPERIOR COURT.—*Jurisdiction, Concurrent.—Tax Deed.—Quietting Title.—Circuit Court.—Statute Construed.*—An action to quiet title to land held under a tax deed may be brought in the superior court. The act of December 21, 1872, providing that such suit may be instituted in the circuit court of the county where the land lies, does not destroy the former act of February 15, 1871, conferring original concurrent jurisdiction of such class of cases upon the superior and circuit courts.

VARIANCE.—*Amendable.—Decree.—Collateral Attack.—Quietting Title.—Misdescription.*—Where, in an action to quiet title, the land is mis-

139	280
139	488
139	280
147	156
139	280
151	583
152	142
139	280
154	412
156	206

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described in the complaint, but is correctly described in the decree, the decree can not, on account of such variance, be collaterally attacked; and, on appeal, such variance would be deemed amended.

QUIETING TITLE.—*Parties Defendant.*—*Omission of Lienholder as Party.*—*Effect of Decree.*—*Practice.*—*Waiver.*—*Collateral Attack.*—The omission of the owner of the equity of redemption as a party to a suit to quiet the title to the land in controversy would not prevent the decree from operating to bar and foreclose those who were parties to the suit, and who were decreed to be barred and foreclosed; and the objection that the owner of the equity of redemption was not a party to the suit could only be taken in that cause by demurrer or by answer (not in a collateral suit), and not being so taken, the objection is waived.

SAME.—*Against Superior Lienholder.*—*Payment or Offer to Pay.*—*Equitable Relief.*—Where a party seeks to have title quieted against superior lienholders, before he can ask the interposition of a court of equity in his behalf, he should either pay, or offer to pay, the superior lien against which he seeks to quiet title.

From the Marion Circuit Court.

E. P. Ferris, F. J. VanVorhis, W. W. Spencer, A. C. Harris, S. Claypool, E. E. Stroup and W. E. Niblack,
for appellants.

O. B. Jameson, for appellees.

DAILEY, J.—The appellants, who were the plaintiffs below, filed in the Marion Circuit Court a complaint of one paragraph in the usual form to quiet title to seven lots, numbered 114, 133, 134, 360, 361, 362 and 363, respectively, in H. R. Allen's second north addition to the city of Indianapolis. A general denial completed the issues and a trial was had, resulting in a finding and judgment for the appellees.

On May 13, 1889, the appellants took a new trial as a matter of right, and thereupon a new trial was had, likewise resulting in a finding and judgment for the appellees. Special findings and conclusions of law were rendered October 9, 1889, on which judgment was entered in favor of the appellees October 15, 1890.

No question arises on the pleadings. The only ques-

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tion is that presented by the assignment of error, that the court erred in its conclusion of law upon the facts found. Appellants assume that the court did so err. Appellees insist that there is no error in the record.

The special findings are numbered from one to twenty-two inclusive, and occupy too much space to be incorporated bodily into this opinion.

The following is a brief summary of what we consider the pertinent facts: As stated, the real estate involved in this litigation is seven lots in H. R. Allen's second north addition to Indianapolis. The Indianapolis Wagon and Agricultural Works became the owner of the lots, September 20, 1873. On October 18, 1876, while said company was the admitted owner in fee-simple of the lots in suit, Browning & Sloan recovered a judgment against it for \$479.61, which became a lien thereon. On December 28, 1885, execution was levied on the real estate, and it was sold by the sheriff and bought in by the judgment creditors for \$300 on January 23, 1886, and a sheriff's deed was afterward executed to the appellants, Browning and Ferris, the latter having taken the place of Sloan, in the certificate, by assignment on the first day of February, 1887. This constitutes the basis of the appellants' claim of title. On the 16th day of November, 1876, the "Indianapolis Wagon and Agricultural Works" became embarrassed, and, for the benefit of their creditors, made a general assignment and conveyance under the statutes of this State, to Eli F. Ritter, trustee of all their property and the lots described in the complaint, with others. The deed was properly executed, acknowledged, and recorded, November 23, 1876. Said Ritter, as trustee, qualified and gave bond December 1, 1876, and filed an inventory and appraisal January 16, 1877. On the 19th day of April, 1877, the said trustee reported to the circuit court of Marion

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county, Indiana, that he had \$393.05 balance of money in his hands, which was allowed him for services. In said report it was shown that said "Wagon Works Company" had filed a petition in bankruptcy, and the court ordered said trustee Ritter to transfer to the assignee in bankruptcy of said bankrupt all of the property, and discharged said Ritter as such trustee on payment of costs, but no transfer or disposition of the lots in controversy was made by said trustee; the lots in litigation are and have remained an open commons uninclosed, with a small building on one of the small lots. The said "wagon works" had been adjudged a voluntary bankrupt on March 30, 1877. On the 20th day of April Henry C. Adams was appointed assignee, and John W. Ray, then register in bankruptcy, as such register, conveyed and assigned to said Adams, as such assignee, all the property of said corporation of which it was seized or possessed, or in which it had any interest, on the 30th day of March, 1877. On May 21st, 1879, said Adams, the assignee, by order of the court sold and conveyed to Davies M. Green, subject to incumbrances, for \$11, all the interest the bankrupt had in lots 114, 133, 134, 360, 361 and 363, named in the complaint, and the assignee was discharged on May 19, 1880.

On the 4th day of February, 1880, one Frank McWhinney filed a complaint in the superior court of Marion county, Indiana, in one paragraph, to quiet title to the lots in controversy against about thirty defendants, including Browning & Sloan, who held the judgment under which the appellants claim title.

On April 9, 1880, the court found that McWhinney claimed under a tax title amounting to \$338.55, and decreed a lien for the same and costs, and ordered the sum paid into court within a time given, and that in default of payment, the lots be sold and the equity of redemp-

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tion of the defendants be foreclosed. Sale was had accordingly, and a sheriff's deed made thereon to the purchasers, viz., of lots numbered 114, 134 and 363, to Davies M. Green, and of lots 133, 360, 361 and 362, to Nathaniel N. Morris.

The appellees have, by mesne conveyances, succeeded to this title, as well as the title under the McWhinney suit, wherein the tax lien was foreclosed.

In the McWhinney suit the complaint erroneously described the lots as being in "Allen & Root's" second north addition to Indianapolis, and at one place, in a preliminary recital in the decree, they were also thus erroneously described. There never was any such addition as "Allen & Root's" second north addition. In the tax deed, as the finding shows, they were correctly described as being in "Allen's second north addition," etc., and they were thus correctly described in the judgment and decree where they were ordered sold, and they were sold and deeds made under proper description.

Appellants contend that there was a fatal variance between the description of the real estate in the complaint and as contained in the decree and order of sale.

Appellants' contention is:

1. That the proceedings in the McWhinney suit were void and ineffective to bar the Browning & Sloan judgment, because the owner of the equity of redemption was not a party thereto.

2. That the proceedings in the McWhinney suit were ineffective to conclude Browning & Sloan, because of the variance between the description of the lots in the complaint and in the decree and order of sale as above stated.

3. That the proceedings in said suit were ineffective as to said Browning & Sloan and did not conclude them,

because the Marion Superior Court had no jurisdiction over the subject-matter of the action.

For convenience, we will consider appellants' points of contention in their inverse order.

As to the third and last objection to the foreclosure proceeding of April 9, 1880, that the court did not have jurisdiction of the subject-matter, it is urged that the act of December 21, 1872 (Acts of 1872, p. 129), was the first enactment in this State providing for the foreclosure of a tax lien, and that none was ever enforced prior thereto; that section 257, p. 120, provided that any person holding any deeds of lands executed by the county auditor for the nonpayment of taxes, may commence a suit in the circuit court of the county where such lands lie, to quiet his title, etc., and section 300, p. 139, stipulated that "All laws and parts of laws in conflict with the provisions of this act are hereby repealed."

Counsel say this was the law when McWhinney began his tax foreclosure, and when he obtained his judgment, and where the statute creates a new right and prescribes a mode of enforcing it, that mode must be pursued to the exclusion of all others. It is upon this theory that they challenge the jurisdiction of the Marion Superior Court.

In defining the jurisdiction of the superior court, it is provided, among other things, in section 1404, Burns R. S. 1894, that "Said court, within and for the county or counties in which it may be organized, shall have original concurrent jurisdiction with the circuit court in all civil causes except slander, and except such causes of which the court of common pleas now (February 15, 1871) has original exclusive jurisdiction," etc.

If we were to concede the appellants' contention, it would necessarily follow that the decree rendered in McWhinney's favor by the Marion Superior Court was

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void, and that Green and Morris, by their purchase thereunder, acquired no title to the property in controversy. It would also follow that such decree and sale did not divest the liens of the judgment creditors, and that such liens still exist.

In the case of *Meikel v. Meikel*, 119 Ind. 421, very similar in its character to the case at bar, the court said: "The superior court * * has jurisdiction of actions brought by persons holding invalid tax deeds to recover from the owners of the land the amount due, and to foreclose his lien," and we are inclined to adhere to the ruling in that case.

The act of February 15, 1871, *supra*, confers original concurrent jurisdiction upon the superior court with the circuit court in this class of cases. The act of December 21, 1872, *supra*, providing that the holder of a tax deed may commence a suit in the circuit court of the county where such lands lie to quiet his title, we think, does not abrogate or destroy the former act. Laws *pari materia* must be construed with reference to each other, and if, by fair interpretation, force can be given to each so that both may stand, they should be upheld by the courts. In our opinion the clause in the statute last enacted, naming or expressing that suit may be brought in the circuit court, does not exclude or suppress the idea that the superior court may have jurisdiction, especially when original and concurrent legal power is conferred by positive statute.

The second objection urged is that of a variance in the description of the property, as contained in the complaint and as contained in the decree and order of sale in the McWhinney case, and that the lots are not sufficiently identified. As we understand it, there is no claim that they are not sufficiently described in the decree. In our opinion the decree can not be attacked in a collateral

suit such as this, and were this a direct attack by appeal, the variance is an amendable one, and would be deemed amended.

In *City of Terre Haute v. Beach*, 96 Ind. 143, it was held that a complaint for an injunction, showing that no petition was ever presented to the board of commissioners for annexation of the territory described in the order of annexation, but that the only petition ever presented described other lands, supplied no grounds for an injunction. "Where there is jurisdiction no irregularities or errors will render the proceeding void, and it is only void proceedings that can be collaterally assailed."

In *Krewson v. Cloud*, 45 Ind. 273, the court say: "Where the attention of the court below has not been called to a discrepancy between the allegations of a complaint and the proof, the objection can not be made for the first time in the Supreme Court. And where the discrepancy is, that real estate is described in the complaint as lying in 'range 13 west,' when the proof shows it to be in 'range 13 east,' the Supreme Court will regard the pleading as amended."

In *Doe on Demise v. Smith*, 1 Ind. 451, the complaint for partition of the west half of the *southeast* quarter, etc., misdescribed it as the west half of the northeast quarter. Subsequent proceedings described the property correctly. The court said "these defects might have been, and probably were, remedied by proof," and the court held that the title derived under the partition suit could not be impeached collaterally.

Morris v. Stewart, 14 Ind. 334, is a case of similar variance in description of land sold in a guardian's proceeding, and supports the same doctrine. It is the law that where the proof varies from the averment, the pleading being amendable below, it will be considered as amended in the Supreme Court. *Cleveland v. Roberts*,

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14 Ind. 511; *Singer Mfg. Co. v. Doxey*, 65 Ind. 65; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Davis v. Doherty*, 69 Ind. 11; *Carver v. Carver*, 53 Ind. 241; *Brownlee v. Kenneipp*, 41 Ind. 216; *Estep v. Estep*, 23 Ind. 114; *Ebersole v. Redding*, 22 Ind. 232; *Case v. Wandel*, 16 Ind. 459.

The remaining question for consideration is whether the omission of the owner of the equity of redemption as a party to the McWhinney suit would prevent the decree in that case from operating to bar and foreclose Browning & Sloan, who were parties, and who were decreed to be barred and foreclosed. And, in this connection also, whether, in a collateral attack by parties to the record in the McWhinney suit, the validity of the decree in that cause may be impeached by evidence *dehors* the record, showing that the owner of the equity of redemption was not a party, the record disclosing no such defect of parties.

There are three propositions of law insisted upon by the appellees as controlling and conclusive of the question:

1st. That the decree in the McWhinney suit barring and foreclosing Browning & Sloan is valid and binding as to them, although the owner of the equity of redemption was not a party to the suit.

2d. The objection that the owner of the equity of redemption was not a party to the McWhinney suit, could only be taken in that cause (not in a collateral suit), and then only by demurrer (if the defect of parties appeared on the face of the complaint, which it did not), or by answer, and not being so taken, the objection was waived.

3d. The validity and effect of the decree in the McWhinney suit can not be questioned by parties to it in a collateral suit, no matter how erroneous, and it is only

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the omitted owner of the equity who did not have his "day in court" who is not concluded.

In Jones on Mortgages (4th ed.), volume 2, section 1679, it is said "if the owner of the equity has, through mistake, not been made a party, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner. * * * The foreclosure is valid as against those who were made parties to the proceeding." In section 1678, the author says: "The purchasers' title under an invalid sale is good against all except the mortgagor and those claiming under him. [*i. e.*, except against the owner of the equity.] * * * The current of authorities agrees that a foreclosure sale, where the owner of the equity of redemption is not a party to the suit, 'is binding upon the parties who have been brought into the action.'" Wiltsie on Mortgage Foreclosures, 1st ed., p. 88. In *Martin v. Noble*, 29 Ind. 216, the owner of the equity of redemption was not served with process, and was therefore not a party. He died, leaving his widow his sole heir. Supplemental complaint was then filed with no process on it as to the widow. The owner of the land was never brought into court. The court held the proceedings ineffectual as to the widow as owner of the land, but binding on all other defendants, of whom there were about one-half dozen who were lienholders by mortgage or tax claims, etc. The court say, p. 219: "The question is therefore resolved in favor of the appellant Mrs. West (the widow), but we are not of the opinion that any other of the parties can avail themselves of the error." In *Curtis v. Gooding*, 99 Ind. 45, the facts were that John C. Curtis made a mortgage. He then conveyed the land to James B. Curtis and Carrie Curtis, husband and wife, who took as tenants by entireties. The mortgage was

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foreclosed as to John C. and James B. Curtis, but Carrie was not a party. A second suit was brought on the mortgage to foreclose against Carrie. The court said, p. 48: "It is true that a decree is valid as to the parties served with process (*i. e.*, John C. and James B.)," but from this it can not be inferred that it is valid as to persons not served, for no man who has not had his day in court is bound by the decree." The converse is that a man having his day in court is bound.

The court says, p. 49: "In a suit to foreclose an equity of redemption not reached by a suit upon the same mortgage, it is not necessary to make persons parties whose rights were fully adjudicated by the first decree, for all that the second decree can properly do is to foreclose the equity of the person not a party to the original suit."

On page 47, the court said, making persons parties to the second suit who were parties to a former suit, would be "twice vexing them about the same cause of action," which would be improper.

Section 343, R. S. 1881, provides that the objection that the owner of the equity of redemption was not made a party to the original suit, could only be taken advantage of in that cause by demurrer or by answer, and not having been so taken, all objection was waived.

In 3 Jones on Mortgs., section 1410, it is said: "Objection that the owner of the equity is not made a party to the bill, may be taken by the mortgagor in his answer. * * * An objection to the nonjoinder of a defendant must be taken by demurrer or answer, or will be deemed to have been waived."

Wiltie Mortgage Foreclosures (1st ed.), p. 91, thus declares the rule: "If the owner of the equity of redemption is omitted as a defendant, the mortgagor or any other party interested in the action may object to it

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by demurrer if the defect appears on the face of the complaint, or by answer, if the defect does not so appear; if objection is not taken, the defect will be deemed waived."

In *Citizens' State Bank, etc., v. Adams*, 91 Ind. 280 (285), it is said: "The appellant * * claims that the cross-complaint (to foreclose a mortgage) was insufficient because Ira B. Adams (the owner of the mortgaged property) was not * * a party to it. There was no demurrer for defect of parties. Defect of parties may be tested either by demurrer or * * answer. Failing to take advantage of it in either way was a waiver of such defect."

In *Binkley v. Forkner*, 117 Ind. 176, another mortgage case, the same familiar rule was applied. The facts, in brief, were these: Kemper bought land and gave a purchase-money mortgage to Eckert Bros. Before purchasing the land he bought an engine and machinery of Hadley, Wright & Co., and gave them a chattel mortgage on it. He then annexed the engine and machinery to the land. Kemper thereupon executed a second real estate mortgage on the land to Forkner to secure a debt to the Dubois County bank. Binkley became assignee of Hadley, Wright & Co.'s chattel mortgage claim, and brought suit against the Eckerts (the holders of the first real estate mortgage), and the Dubois County bank (who held the debt secured by the second real estate mortgage). Kemper, the owner of the land, as well as of the engine and machinery, was not a party to the action. The suit was simply between mortgagees.

The court say, on page 187: "Some suggestions are made in the briefs * * * in respect to a defect of parties. The length of the opinion forbids that we should notice these * * further than to say they do not involve any error. * * * No objection pertaining to the alleged

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defect of parties seems to have been made in the court below."

In support of this doctrine we also cite: *Atkinson v. Mott*, 102 Ind. 431; *Lee v. Basey*, 85 Ind. 543.

In *Cord v. Hirsch*, 17 Wis. 415, it is also held that the objection that the party in whom is the equity of redemption of mortgaged premises is not made a party to the foreclosure suit, must be taken by demurrer or answer, or it is waived; and on p. 421 it is said: "Such waiver is * * * an abandonment of every objection or advantage of objection arising * * * upon that ground equivalent to a release of errors * * * or a formal admission of record by the defendants that the parties before the court are the proper parties and all the necessary parties to a complete and formal adjudication. * * * It is as if the Legislature had declared that henceforth it shall be deemed there is no defect of parties."

In *Baker v. Hawkins*, 29 Wis. 576, one Hawkins was shown by the complaint to be the owner of the property and was omitted as a defendant to the foreclosure suit. The court held the same doctrine and refused to reverse the case on the appeal of those who were parties, and cites Story, Daniell's Ch., and English authority, and N. Y. Chancery practice, showing the rule to be the same independent of statutory enactment. The Wisconsin, New York, and Indiana statutes simply declare what was already the rule. We cite to the same effect *Taylor v. Collins*, 51 Wis. 123.

In *Williams v. Meeker*, 29 Iowa, 292, it is said: A person claiming an interest in mortgaged premises, who is joined as a defendant in a proceeding to foreclose the mortgage can not object that the mortgagors are not served or in court; and, on p. 294, that "defendant failed to show any title or interest in the lands to sup-

port his claim. * * * He can not object to the foreclosure."

In *Semple v. Lee*, 13 Iowa, 304, it is claimed that one Lee *et ux.* were necessary defendants. The court say, on p. 305: "It is a sufficient answer that Lee and wife do not complain. As between the complainant and the mortgagors the judgment is good. If Lee and wife do not complain, no other person or party can do so for them."

The case of *Davis v. Bechstein*, 69 N. Y. 440, holds that defect of parties must be taken by demurrer or answer, or it is waived.

All the authorities, both in and out of the code States, sustain this rule.

Bouvier, under "Waiver," says: "In practice it is required of every one to take advantage of his rights at a proper time, and neglecting to do so will be considered as a waiver."

The case of *Reid v. Mitchell*, 93 Ind. 469 on pages 472, 473, holds that "Where it is sought to impeach or vacate the record of a judgment by the allegation of facts not apparent on its face but wholly dehors the record, such an attack upon the record of a judgment is a collateral attack. We need hardly add, nor cite authorities * * that the record of a judgment can not be collaterally attacked where it appears, * * that all the parties were before the court when the judgment was rendered, * * a judgment, regular and legal upon its face, is absolutely conclusive between the parties thereto, * * until reversed or set aside on a direct appeal."

In *Earle v. Earle*, 91 Ind., 27 on p. 42, it is said: "The general and correct rule, * * is, that a judgment by a court of competent jurisdiction is not void, unless the thing lacking, or making it so, is apparent upon the face of the record. If the infirmity do not so appear, the judgment is not void, but voidable, * * and is bind-

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ing upon the parties to it, as against a strictly collateral attack."

In *Dwiggins v. Cook*, 71 Ind. 579, the court holds that "In a collateral suit, the validity of a judgment can not be called in question, because a necessary party was omitted in such suit."

In *Harman v. Moore*, 112 Ind. 221 (222), the rule is thus stated: "Where the record of a court of general jurisdiction, either affirmatively or by the presumptions which attach to it, shows that a judgment has been rendered against a party over whom the court had acquired jurisdiction, any attack, the sole purpose of which is to have the judgment declared void, by showing matters *dehors* the record, is a collateral attack and can not be made by a party to the judgment."

In *Lantz v. Maffett*, 102 Ind. 23, the court said: "Where it appears on the face of the record that the court had jurisdiction, the judgment can not be impeached collaterally. * * * If the court had jurisdiction, its judgment, however erroneous, is not void, and if not void, it is not vulnerable to a collateral attack. * * * It seems clear that the face of the record discloses a case in which the court had jurisdiction, * * * the judgment will repel all collateral attacks. * * * A judgment rendered by a court having general jurisdiction will be upheld against a collateral attack unless it appears on the face of the record to be void."

The court said, in *Smith v. Hess*, 91 Ind. 424, that the general and correct rule is that a judgment by a court of competent jurisdiction is not void unless the thing lacking or making it so is apparent on the face of the record. If the infirmity do not so appear, the judgment is not void but voidable, * * * is binding upon third parties and the parties to it as against a collateral attack.

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We also cite, in this connection, *Woolery v. Grayson*, 110 Ind. 149.

Where there is jurisdiction, the parties are bound by all orders, judgments and decrees made in the cause. *Meikel v. Meikel*, *supra*.

"There can be no judicial inspection behind the judgment save by appellate power." *Anderson v. Wilson*, 100 Ind. 403 (407).

These rules, in our opinion, are applicable to, and conclusive of, the questions involved in the case at bar.

Browning & Sloan were made parties to the McWhinney suit, and were there challenged to assert their rights. They remained silent as to any judgment lien they might possess, when it was their duty to speak. *Res judicata* applies to everything that was determined in the original suit, and to everything that might have been therein adjusted.

The case of *Abbott v. Union Mut. Life Ins. Co.*, 127 Ind. 70, is adduced as authority against the view herein expressed, and seems to be the hope and reliance of the appellants for the reversal of this cause. That case contains several features quite analogous to the one under consideration. The land in controversy in the Abbott case was owned by Kelley, who executed two mortgages on the same, one to Abbott and the other to the Union Mutual Life Insurance Company. One Huddleson acquired a tax title of the property and foreclosed it in an action against the mortgagees, Abbott and the insurance company, and against one Knight, whose interest was nowhere disclosed. Neither Kelley nor his heirs were parties. A sale was had on the Huddleson tax foreclosure, the insurance company becoming the purchaser and receiving the deed. In this opinion the court said that as Kelley was the owner of the land at the time he executed Abbott's mortgage, the presumption is that he still

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owned it at the time of his death, and that it descended to his heirs.

The court further said: "It seems to be quite well settled that a sale on a decree of foreclosure, where the owner of the property upon which the lien rests is not made a party, is void."

Assuming, without deciding, that these appellants acquired title by purchase at a sale on the Browning & Sloan judgment, and have the right to redeem, still they are not entitled to maintain this action to quiet title, for the reason that the tax lien would be yet unsatisfied, and a claim superior to the judgment of Browning & Sloan. Even upon the appellants' theory, the effect of the decree in the McWhinney case was to adjudicate that McWhinney had a tax lien on various lots, including those in controversy here, for \$338.53, interest and costs, superior to the lien of the judgment under which the appellants claim, and that the appellees have succeeded, in the proportion in which their several lots were assessed for taxation, to the McWhinney tax lien. It is elemental that before they can ask the interposition of a court of equity in their behalf against such lien-holders, they should either pay, or offer to pay, the superior lien against which they seek to quiet title. Until then, they have no standing in a court of equity. *Shannon v. Hay*, 106 Ind. 589 (593); *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 34 Ind. 360; *Lancaster v. DuHadway*, 97 Ind. 565; *Rowe v. Peabody*, 102 Ind. 198; 2 Am. and Eng. Encyc. of Law, 310.

For these reasons we do not think the court erred in its conclusion of law upon the facts found.

Judgment affirmed.

HACKNEY, J., took no part in this opinion.

Filed May 16, 1894; petition for a rehearing overruled Nov. 13, 1894.

Chicago and Calumet Terminal Ry. Co. v. Whiting, etc., St. Ry. Co.

No. 17,059.

THE CHICAGO AND CALUMET TERMINAL RAILWAY COMPANY v. THE WHITING, HAMMOND AND EAST CHICAGO STREET RAILWAY COMPANY.

INJUNCTION.—*Right of Street Railroad to Cross Steam Railroad at Street Crossing.*—*Street Railroad's Right Founded on Public Easement.*—*Subject to no Conditions Other than those Placed on the General Public.*—Since it is the settled law of this State that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railway company's right to use the street is founded on that easement, it must be held that the right of a street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. Hence, it is not error to enjoin a steam railway company from interfering with a street railway company where the latter is proceeding to construct a proper crossing at its own expense. And the same principle applies where the crossing is in a public highway not a street.

From the Lake Circuit Court.

E. D. Crumpacker and H. S. Boutell, for appellant.

W. Olds and C. F. Griffin, for appellee.

MCCABE, J.—This is an appeal from an interlocutory order granting a temporary injunction against the appellant interfering with or preventing the appellee from laying its railway connections over and across the road-bed and right of way of said appellant at the points where the tracks of appellee intersect the tracks of appellant, at the points where appellant's tracks and railway cross the following streets, namely, Hohman street, Gostlin street, and Oak street, in the city of Hammond, Ind.; Forsyth avenue, in the city of East Chicago, Ind., and Indiana Boulevard, a public highway nearly south of Whiting, Ind., where the tracks of appellee would, if connected, cross the said tracks of appellant.

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It is assigned for error that the complaint does not state sufficient facts, and that the court erred in granting the temporary injunction.

It appears from the complaint, that the appellee is a corporation organized under the laws of this State providing for the incorporation of street railway companies (2 Burns R. S. 1894, sections 5450 to 5465; R. S. 1881, sections 4143 to 4155), and that in the year 1893 it secured from the mayor and common council of the city of Hammond, Indiana, by ordinance duly enacted, a franchise permitting it to use certain streets in said city, among which are the streets already named, for the purpose of constructing thereon a street railway to be operated by electricity, with all the necessary appliances; that in said year last named the appellee also secured from the city of East Chicago, Indiana, then an incorporated town, and since incorporated as a city, by ordinance duly enacted, a franchise granting to appellee the right and privilege to use certain streets in said town, among them being Forsyth avenue, above named, for the purpose of constructing thereon its said electric street railway; that in the same year it secured from the board of commissioners of Lake county, in said State, by orders duly adopted, a franchise and license granting it the right to use certain public highways of said county, among which is Indiana boulevard, for the purpose of constructing, maintaining and operating thereon its said electric street railway, all of which licenses and franchises were duly accepted by appellee, and it gave bond in the sum of \$10,000 to each of said municipal corporations, conditioned that it would save them harmless on account of any negligence of appellee in the construction or operation of its said street railway; that the purpose of appellee, and the purpose of its corporation was, and is, the construction and operation of an electric street

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railway in the said town, now city, of East Chicago, and through the said city of Hammond, Indiana, over certain public highways of the said county of Lake to and through the village of Whiting, in said county, and thence over certain public highways, the right to use which had been granted by the said board of commissioners, as before stated, to the State line between the States of Indiana and Illinois, at a point on the said Indiana boulevard near the village of Roby; that it has constructed its said street railway, with all its attachments and appurtenances, with the exception of certain railroad crossings at points where its said line of railway crosses the tracks of steam railroad companies upon said public highways hereinafter mentioned; that it has been, and now is, operating all that portion of its said railway in the city of Hammond lying south of the Michigan Central railroad tracks in said city, being about two miles in length, and its entire line is completed from the Michigan Central railroad tracks, in said city of Hammond, to and through the said city of East Chicago, with the exception of the railroad crossings before mentioned; that the appellant is a corporation operating by steam power a line of railway from the city of Chicago, Illinois, into said county of Lake, in the State of Indiana, passing through said city of Hammond, the said city of East Chicago and the said village of Whiting; that the railroad tracks of said appellant cross the said Hohman street, Gostlin street, and Oak street, in said city of Hammond, and the said Forsyth avenue, in the city of East Chicago, as nearly as may be at right angles, and the said Indiana boulevard at a point near and south of the said village of Whiting in a direction nearly if not quite at right angles; that the tracks of said street railway are laid upon, along and lengthwise with the said streets and public highways aforesaid, and when completed, by the

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construction of connections or crossings over the tracks of said appellant, it will cross the said appellant's railway tracks at all points where they cross the said streets and public highways; that appellant had refused to permit the said street railway company to connect its said railway tracks by constructing proper railroad crossings and connections where the tracks of appellee cross the tracks of appellant as aforesaid, unless appellee will enter into a contract with appellant agreeing to certain requirements demanded by appellant covering the expense of maintaining gates and flagmen at said points, and the future construction by appellee, at its own expense, of certain devices commonly known as interlocking switches which may in future be demanded, and will, unless restrained, prevent by force the construction of said crossings, and has threatened to, and will, tear up and remove by force any crossings or connections at said points across its said railway tracks which appellee may succeed in constructing thereat; that by force appellant has made it impossible for appellee to operate its said street railway between the said city of Hammond and the said city of East Chicago, and appellee can not so operate its said street railway to connect any of said cities or villages aforesaid until said tracks are connected and crossings laid over the tracks of appellant at the points aforesaid; that appellee has a large force of men ready to construct and lay the said crossings, and is now ready and waiting to operate its said road except the laying of the said tracks across the appellant's tracks; that in the connection of its said railway tracks and the laying of said crossings aforesaid, appellee does not propose, nor has it proposed, desired or intended to in any manner attach or fasten the same or lay the same upon or against any of the railway tracks of said appellant without its consent, but it desires to and will, if protected by a restraining

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order, lay its said tracks up to the rails of said appellant, and between the same at right angles, therewith forming what is known as "a jump crossing;" that such crossings are in common use by street railway companies; that it will in no manner interfere with, retard or endanger the running of trains by said appellant, nor will they in any manner interfere with or restrict its use of said property or lessen the value thereof. Prayer that the appellant be restrained from doing the acts complained of until the further order of the court, and on the final hearing that appellant be perpetually enjoined.

It is the settled law of this State that the public takes only an easement in the streets of a city or town, and if a steam railroad company lays its tracks upon such streets the abutting owner of the fee whose title extends to the center of the street is entitled to recover damages. *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29; *Eichels v. Evansville St. R. W. Co.*, 78 Ind. 261; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Sharpe v. St. Louis, etc., R. W. Co.* 49 Ind. 296; *Ross v. Faust*, 54 Ind. 471; *Nelson v. Fleming*, 56 Ind. 310; *Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind. 314; *Roelker v. St. Louis, etc., R. W. Co.* 50 Ind. 127. The basis upon which this rule rests is that the appropriation of the soil over which a street passes for the construction, operation, and maintenance of a steam railway is a new or additional appropriation to that of the easement granted to the public which entitles the abutting owner to such damages as he may sustain thereby. *Cox v. Louisville, etc., R. R. Co., supra*.

It follows from this that the steam railway which obtains a right of way over a street, and constructs its railway thereon, obtains something more than an easement, it obtains property rights in such right of way subject only to the right of the public to travel over the

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street. And the question here presented by challenging the sufficiency of the complaint is whether the same rule applies to street railways, that is, whether the appropriation of a street to the use of a street railway is a new and an additional appropriation, a new and additional burden to that of the easement of the public generally. It is conceded by the appellant that a street railroad is not an additional burden upon the fee in the street, although appellant claims that strong reasons exist against the doctrine. It is conceded, however, that the courts have quite generally held that such use of a street is not an additional burden; that it is simply an extended use of the right which the public acquired in the first instance.

This concession we think admits that the appellant has no cause to complain of the action of the circuit court.

The writer of this opinion seriously doubts the soundness of the rule thus conceded by the appellant. It is true street railway corporations as a component part of the general public have a right to the use of the public streets of a city or town for the purposes of ordinary travel over them in the same way that any other portion of the general public may enjoy that right. But when they obtain a right of way over such streets to lay down their tracks on such streets they obtain and secure a right and an interest in the street that the general public does not, and can not, have and enjoy. They obtain to all intents and purposes as much a property right in their right of way in the street attached to the soil as the steam railway laid on such streets. This is so because such companies are authorized to mortgage their corporate property and franchises to secure the payment of loans of money to the corporation. Such power necessarily carries with it power to sell such property and

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franchises at sheriff's sale to make the money. 2 Burns R. S. 1894, section 5473. *New Orleans, etc., R. R. Co. v. Delamore*, 114 U. S. 501. How such a right can constitute nothing more than the easement the public has in the street, it is difficult to understand. If the location and operation of a street railway on a public street is no new nor additional burden on the soil, but rests on the easement the public has in the street, then it seems to the writer the company need not obtain any license permit or franchise from the municipal authorities to construct its tracks in the public streets of a city. And yet it is the settled law in this and other States that a street railway can not be laid upon the streets of a town or city without a grant of a license or franchise therefor, either by the municipality or the Legislature. *Indianapolis Cable Street R. R. Co. v. Citizens' St. R. R. Co.*, 127 Ind. 369; 23 Am. and Eng. Encyc. of Law 946, 947, and authorities there cited. No other part of the public is required to obtain a license or franchise to use or enjoy the easement of the street.

The very fact that a franchise is required to authorize and justify a street railway company to lay down its tracks on a public street, seems to the writer a sufficient reason for saying that such was not one of the uses in contemplation when the street was opened and dedicated. Besides, it is settled law that the street railway company, when once its track is constructed on a street, has rights over that part of the street where its track is located superior to those of the public who enjoy only the easement in the street. For instance the public must turn off the street railway track when met by the street railway cars. 23 Am. and Eng. Encyc. of Law 990, 991, and authorities there cited.

But the overwhelming weight of authority seems to settle the law, both in this State and elsewhere, that a

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street railway is not an additional burden to that of the general easement in the street, and that the owners of the fee are not entitled to damages on account of the construction thereof on a public street. *Eichels v. Evansville St. R. W. Co.*, *supra*; *Indianapolis Cable St. R. R. Co. v. Citizens St. R. R. Co.*, *supra*; *Elliott v. Fair Haven, etc., R. R. Co.*, 32 Conn. 356; *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Jersey City, etc., R. R. Co. v. Jersey City, etc., Horse R. R. Co.*, 20 N. J. Eq. 61; *Cincinnati, etc., St. R. W. Co. v. Cumminsville*, 14 Ohio St. 523; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194; *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; *Brown v. Duplessis*, 14 La. Ann. 842; *Savannah and Thunderbolt R. R. Co. v. Mayor, etc.*, 45 Ga. 602; *Peddicord v. Baltimore, etc., R. W. Co.*, 34 Md. 463; 23 Am. & Eng. Encyc. of Law, 954, 955, 956 and 957, and authorities there cited.

These authorities, and others that might be cited, so firmly settle the rule that it could not now be departed from without serious disturbance of vested property rights. The use of the street by the appellant is subject to the easement in the public and the burden of keeping the street crossing over its tracks in such a condition as not to impede or obstruct the public easement and use of the street by the public generally is a burden already resting on the appellant. That burden is in no way to be added to or increased by the crossings appellee proposes to construct. So long, therefore, as it is the settled law of this State that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to

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which the general public is subject in traveling over such streets. When the steam railway company obtained its right of way over and along a public street it does so subject to the right of the general public to use such street and the street crossings over its tracks; and it is generally incumbent on such steam railway company to make such crossings as passable for the general public as they were before the construction of their tracks thereon. The duty, therefore, is incumbent on the steam railway company only to make the crossing as passable as it was before the construction of its tracks thereon for the public generally, or as nearly so as practicable. That does not impose the burden of providing cross rails and tracks for the street railway to make the crossing. But the street railway is proposing to furnish all that itself, and to be to all the expense of making the crossing and connection.

Appellant contends that this will be a burden and a hindrance to the free and unobstructed use of the appellant's steam railway, which, it is claimed, is a taking of private property without just compensation in violation of the constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway. But, having obtained its right of way subject to the burden of the easement in the public generally, and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof in the ordinary and proper manner for its street railway.

The complaint shows that appellee was only proposing to use the streets at the crossings in the ordinary

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and in a proper manner for the construction of street railway crossings, and that it had been hindered and obstructed therein by the appellant in the use of force. It would, therefore, not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right of way over and across the streets named free from the burden of the public easement, a part of which belongs to the appellee, the street railway. The conclusion we reach is not in conflict with the case of *Indianapolis, etc., Gravel Road Co. v. Belt R. W. Co.*, 110 Ind. 5, cited and relied on by the appellant.

In that case the gravel road company was a private corporation and the owner of the gravel road before the construction of the Belt Railway. The property of the gravel road company was not acquired subject to any easement in the public, or any one else, to construct a railroad across its gravel road. It was there held very properly that while the statute confers upon railroad companies the power to cross highways, and to do so without the payment of compensation so far as the public is concerned, yet that a gravel road company owning its road owns it as anybody else owns his property, and that private property can not be taken by any one without just compensation, nor, except in case of the State, without such compensation first assessed and tendered. Article 1, section 21, Constitution of Indiana. And it was there further held that the building of a railroad across such gravel road would be a taking of private property within the meaning of the section of the constitution referred to, on the ground that it was an incumbrance on the property. Manifestly that case has no application here because the gravel road company acquired its property in the gravel road, not subject to, but free from any easement or incumbrance of any kind whatever. Not

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so with the appellant, the steam railway company, in the case now before us. As we have already seen, it acquired its rights subject to the easement and incumbrance against which it admits by its assignment of error it has made forcible resistance.

The same principle applies to the crossing over appellant's tracks, where they cross Indiana boulevard, a public highway of the county. The statute provides that the county board may grant the right or privilege to a street railway company to use any public highway of the county for its street railway. 2 R. S. 1894, sections 5465 to 5468; R. S. 1881, sections 4155 to 4158.

The right to pass over the highway by the steam railway is subject to the easement of the public, a part of which is owned and enjoyed by the street railway.

We are, therefore, of opinion that the complaint stated facts sufficient to constitute a cause of action, and that the circuit court did not err in granting the temporary injunction. Therefore, the interlocutory order granting the same is affirmed.

Filed Nov. 13, 1894.

No. 16,909.

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TRUST.—*When Trustee Entitled to Compensation for Services in Trust Capacity.*—*Quantum Meruit.*—Where a person accepting a trust is not a beneficiary under the instrument creating the trust, and there is no agreement in relation to compensation of the trustee for his services, but he expected to be compensated therefor, and never understood that he was expected to serve gratuitously, the trustee is entitled to recover the reasonable value of his services in his trust capacity.

SAME.—*Compensation of Trustee.*—*Primary Liability for.*—*Mortgage.*—Where the labors of a trustee named in a mortgage securing certain

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bonds consisted largely in doing the things which the mortgagor covenanted to do, such as keeping up the insurance on the mortgaged property, paying taxes, etc., because of the default of the mortgagor to do the same, the charges for compensation ought to be primarily against the mortgagor, or the mortgaged property.

SAME.—*Compensation of Trustee.—Fund Primarily Liable Therefor.*—Whether the claim of the trustee for compensation is primarily against one fund or another depends upon the facts of each particular case, i. e., the character of the services rendered by the trustee.

From the Marion Circuit Court.

A. Baker and E. Daniels, for appellant.

A. C. Ayres, A. Q. Jones, E. Ritter, H. L. Ritter, J. S. Duncan and C. W. Smith, for appellees.

DAILEY, J.—On the 27th day of October, 1879, the Indianapolis Rolling Mill Company, a corporation, executed a mortgage on certain described real estate in Marion county, to secure fifty bonds of one thousand dollars each, due in ten years from date. Asa G. Pettibone was named in the mortgage as trustee, with a provision contained therein that if he should at any time fail, neglect, or be unable to act as trustee thereunder, the appellee, George B. Yandes, should become his successor. Pettibone accepted the trust, and continued to act as such trustee until shortly before the 8th day of July, 1880, when he resigned, and on the last named date the appellee, Yandes, accepted said trust and continued to act in that capacity until after the maturity of the bonds, as hereinafter stated. At the time he accepted the trust there was no agreement, either that he should receive compensation, or that he should serve without compensation. He never understood that it was expected he should serve gratuitously, and always expected to be recompensed therefor.

The company continued in active operations until in January, 1888. Up to that time the company had in the

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main attended to the insurance of the property covered by said mortgage, and Yandes' services consisted mainly in seeing that insurance policies were furnished him, as required by the terms of the mortgage, and that the mortgagor performed the covenants contained in said instrument. After that date the mortgagor gave no attention to the insurance, and said trustee was required to keep constant notice as to the policies upon the premises to prevent a forfeiture and keep the insurance alive. At the time of the execution of the mortgage said Pettibone was president of the Citizens' National Bank of Indianapolis, and when Yandes accepted the trust he was cashier thereof, and it had the deposits of the Rolling Mill Company.

It was agreed between all the parties to this proceeding that a fair compensation to Yandes for his services was \$1,050, but that there should be deemed to have been paid thereon the sum of \$250, on account of benefits accrued to the bank by reason of such deposits. During the year 1886 the company paid directly to the holders thereof twenty of said bonds, which were canceled and delivered to the trustee.

In September, 1889, the company being embarrassed and creditors being about to commence proceedings to collect their claims, an arrangement was made between the unsecured creditors providing that the property covered by said mortgage should be conveyed to a trustee, to be held by him for one year, and if the debts were not paid within that time, the same should be conveyed to these creditors subject to such mortgage, and in such event the person or persons taking the conveyance should pay off the mortgage, and relieve the mortgagor from all liability on account thereof, and pursuant to such agreement, such property was conveyed to Albert Baker, trustee. At the end of the year the debts were not paid, and

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the creditors made an arrangement to sell the property to appellant, the Premier Steel Company. But not being able to procure the production and surrender of said bonds for payment, it was arranged between the general creditors, the mortgagor, and the appellant, that instead of the mortgagor insisting upon the creditors or the appellant then paying off such outstanding bonds, it should accept the bond of the appellant with Charles W. De Pauw as surety conditioned for the assumption and payment of the mortgage indebtedness by the appellant, for the complete protection and indemnification of the mortgagor from any personal loss, damage, or inconvenience therefrom. Pursuant to said arrangement, the mortgaged property was conveyed to appellant and it executed such bond with the surety agreed upon.

When the proceedings were had in the court below, the appellant was the owner of the mortgaged property. At the time of the conveyance, the appellant company had no notice of the claim of Yandes other than such as would be inferred from the existence of the mortgage and knowledge of the acceptance of the trust by him. More than a year after the maturity of the bonds, the holders thereof not desiring to proceed to foreclose the same, and the mortgagor and those bound to pay them not desiring them to do so, Yandes gave notice to the mortgagor, the holders of the bonds, who resided in this State, and to the appellant, that he proposed to file his petition to the Marion Circuit Court, asking permission to resign, and an allowance for his services.

Accordingly, on the 24th day of January, 1891, he presented his petition to the court and prayed that the court make him such allowance. Thereupon it was agreed by and between all the parties to whom notice had been given, that the court might accept such resignation and appoint John W. Ray successor in said trust,

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and that the matter of such allowance should be continued until the new trustee should be able to confer with all the bondholders, when it should be disposed of with the same force and effect as if acted upon at the time of such resignation and before the appointment of his successor. Under the foregoing facts the court allowed Yandes \$800 for his services as trustee, and decreed said sum a part of the indebtedness secured by said mortgage; that the same is a first charge upon the mortgaged premises prior to the claims of the holders of the bonds secured by the mortgage, and that the Premier Steel Company took such mortgaged real estate, charged with the payment of said sum, in addition to the principal and interest of the bonds. From this decision the appellant prosecutes an appeal.

Three questions are presented by the record. 1st. Under the foregoing facts was Yandes entitled to any allowance for his services? 2d. If so who ought to pay the same, or upon what fund should such allowance be made chargeable? 3d. Did the court in this proceeding have authority to fix such compensation, decree who should pay it, or upon what fund or property chargeable, and to make the order it did make?

It is true there are many English authorities holding that trustees are not entitled to compensation unless there is an agreement to that effect and provision made therefor. But the overwhelming weight of authority in this country is the other way, and is supported by every consideration of right and justice. By the acceptance of the trust delicate and important duties were imposed on the trustee, the nonperformance of which would have caused him to incur grave responsibilities. He was required, as an incident to the trust, to exercise diligence and active attention to preserve the property and secure the performance by the mortgagor of the covenants con-

tained in the mortgage. In the discharge of his duties, during more than ten years of active service, he was vigilant in watching and looking out for the solvency of the insurance companies, observed the forms of the policies, kept the insurance alive; also, saw that the taxes and assessments against the property were paid, and no liens allowed to accrue thereon.

It is conceded in the brief of the learned counsel for the appellant, that the special finding shows the exercise of extreme caution on the part of Mr. Yandes, possibly some worry, but for all this it is asserted "he must hold his temperament responsible, not the trust estate;" and this, too, when the trustee did not suppose he was required to perform such services gratuitously, and expected to receive fair compensation.

It is a familiar rule of law that where one requests another to perform services of value to him, and there is no agreement as to compensation, it implies a promise on the part of the latter to pay therefor what such services are reasonably worth. In such case the party benefited can not evade his liability when a reasonable remuneration is asked, upon the ground that there was no agreement to pay. But we are not without authority in support of this reasoning. In *Jones Corp. Bonds and Mort.* (2d ed.), section 567, it is said: "Trustees under corporate mortgages have an inherent equitable right to be reimbursed all expenses reasonably incurred in the execution of the trust, and for such expenses they have a lien upon the trust property. Their rights go even further than this; for, if the trust property prove insufficient to reimburse the trustees for their proper expenses and *reasonable compensation*, they may call upon the bondholders in whose behalf the trust was created to pay them. It is immaterial that the deed of trust makes no provision for the payment of such expenses

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and charges; this is a legal right, which necessarily attends the administration of the trust. The franchise and property conveyed to the trustees become charged with a lien in their favor, and they remain so charged until the trustees themselves do something that operates as a discharge of such lien. * * * Their lien upon the property extends not merely to claims for their own services, and for payments actually made by them, but to advances made to them by bondholders to supply them with funds in the course of the administration of the trust," etc.

The authorities cited in support of the text go fully to the point, and apply as well to "conditional trusts" as to "testamentary trusts" and "official trusts," and deal both with the question of reimbursement for advances and compensation for services.

Section 570, *supra*, says the receiver's claim is the first charge upon the property, and by section 574, it appears that the trustee is entitled to his compensation, and to the expenses of the trust, and costs of sale before making distribution of the proceeds of sale to the bondholders. The mere fact that there has been no foreclosure and no fund in court, can not change the principle here involved. It is suggested that Yandes' services, as found by the court, were not such as were required of him in his trust capacity. There are many covenants contained in the mortgage to be kept and performed, such as payment of taxes, or other assessments or liens; keeping the premises insured to the amount of \$50,000, and in good and complete state of repairs; doing nothing by which the value of the security should in any wise be weakened, lessened or destroyed. It was also provided that if the mortgagor failed to make the payments the trustee might foreclose for the breach, and it is not questioned that he performed all that was required of him in these respects.

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The appellant's counsel interpose as an objection to the allowance, the rule that where the trustee is himself one of the beneficiaries under the instrument creating such trust, and there is no contract for compensation therein, and it does not otherwise appear that the same was intended to be paid, none should be allowed. This rule has a fair support in reason and justice. The benefit that comes to the trustee by the terms of the instrument, in such case, may well be supposed to be the consideration upon which the trustee accepts and executes the trust. But Yandes was not a beneficiary under the instrument, nor was the bank. It is true, that at the time the trust was created the mortgagor was a depositor in the bank, and the bank was to that extent benefited. But that had nothing whatever to do with the matter of the trust. The mortgagor was a depositor before the creation of the trust, whether it continued to be so or not depended upon it alone; there is no pretense that there was any agreement that the deposit should continue, or that the trustee should perform these services in consideration of the deposit. Indeed, the latter supposition is expressly negatived by the seventh special finding.

There is a question presented as to whether the trustee's services are chargeable on the funds produced by the payment of the bonds, and to be deducted therefrom, so that the cost comes out of this fund, or whether such charges should be against the property, to be paid by the mortgagor, in addition to the principal and interest, before his mortgage can be satisfied. It seems difficult to state any general rule, as to whether the claim of the trustee is primarily against the one fund or the other. The solution of that question, we think, should depend upon the facts of each particular case. In our opinion, the character of the services re-

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quired to be performed by the trustee, and which have been performed, and for which compensation is asked, ought to be taken into consideration in determining who is primarily liable therefor.

In this case, as the labors of the trustee have consisted largely in the doing of things which the mortgagor covenanted to do, such as keeping up the insurance, paying the taxes, etc., and as the trustee has been compelled to do the work because of the default of the mortgagor, the charges ought to be primarily against the mortgagor, or the mortgaged property.

As to the eleventh special finding, that neither the bondholders, the rolling mill company, nor the Premier Steel Company had any knowledge as to the claim and demand of Yandes for compensation, except that given by the record of the mortgage, and the acceptance of the trust by him, until after the execution of the bond of indemnity by the appellant to the mortgagor, it is clear that the bondholders and the mortgagor knew, from the beginning, of the relations of Yandes to the trust, and the appellant was given notice of this relation, by the very terms of the indemnity bond, and also by the terms of the deed to it of the property, which contained a covenant to pay the mortgage. Thus all the parties knew of such relation, and knowing it, they must take cognizance of his right to claim pay for services. Upon this point, the court in *Rensselaer, etc., R. R. Co. v. Miller*, 47 Vt. 146, (154), says: "All the parties in this cause claiming against the trustees, are chargeable with knowledge of the relations of said trustees, and of their rights arising from said relation." It is contended by the appellant, that if Yandes was entitled to compensation as upon a *quantum meruit*, yet, so much of the judgment as decreed a first lien upon the mortgaged premises, and ordered the sale thereof as upon

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foreclosure, was void for want of jurisdiction of the *corpus* of the trust, and that the only way the trustee had to secure his allowance, and compel its payment, was by a bill in equity.

It is conceded that this was true at common law. But since 1843 it has been the policy of our law to keep such express trusts constantly under the supervision and control of the courts, so that the trustees can be required by summary proceedings to answer as to their conduct.

A careful reading of the Revised Statutes of 1881, sections 2969 to 2997, inclusive, convinces us that it was the purpose of the Legislature to give courts jurisdiction of conventional trusts, however created. So far as the present question is concerned, there is no difference whether the trust is created by mortgage, by deed, or by will, as the trustee is a *quasi* officer of the court. Indeed, it appears to us, there can be little room for doubt as to this proposition.

Section 2978 provides that upon the death of a sole or surviving trustee of an express trust, the trust estate vests in the court, and it shall appoint a successor.

Section 2979 provides that "Upon petition of any trustee of an express trust, a court having jurisdiction may accept his resignation and discharge him from the trust, upon such terms as the rights of the persons interested in the execution of the trust may require."

Section 2980 provides that the court may remove a trustee for violation or neglect of duty.

And section 2997 provides that "said trustee and the funds in his hands shall be at all times under the equitable control of the court having jurisdiction thereof for the preservation of the funds and carrying out the purposes of the trust."

The record in this case affirmatively shows that at the time this order was made, every bondholder, the mort-

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gagor, the Premier Steel Company, and the successor in the trust, had been notified and were present in court by counsel, possessed of every opportunity to protect their rights. It would be a strange conclusion to hold that although a statute should provide for the resignation of a trustee, and its acceptance by the court, and his discharge, upon such terms as the rights of the persons interested in the trust might require, and yet, that the court could not fix his compensation. Of course his discharge presupposes a settlement and accounting for the trust fund and a complete adjustment of all the affairs pertaining to the trust, and it would be unjust to compel him to file a bill in equity to recover what may be due him as a just recompense for his time and trouble.

As we find no error in the record, the judgment is affirmed.

Filed Nov. 21, 1894.

No. 16,802.

THE INSURANCE COMPANY OF NORTH AMERICA v. MARTIN ET AL.

PARTIES.—*Necessary Party.*—*Party in Interest.*—*Sufficiency of Complaint.*—*Payment.*—*Multiplicity of Suits.*—*Insurance Company.*—*Subrogation.*—A mortgaged his land to B to secure a loan of \$1,000, and as a further security for such sum A procured from C a policy of insurance upon a dwelling house situated upon such land in the sum of \$300. Afterwards A conveyed the land to D, without the consent of C and without any assignment of the policy, but upon the agreed consideration, in part, that D should assume and pay the said mortgage. The mortgage clause in the insurance policy provided, among other things, "that whenever this company shall pay to the mortgagee or beneficiary any sum for loss under the policy, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made,

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under any and all securities held by such party on the property in question, for the payment of said debt; but such subrogation shall be in subordination to the claim of said party for the value of the debt so secured, or this company, at its option, may pay to the mortgagee or beneficiary the whole of the debt so secured, * * * and shall thereupon receive from the party to whom such payment is made an assignment and transfer of said debt, with all securities held by said party, * * for payment thereof." Soon after the sale to D the dwelling house was destroyed by fire. C paid B the amount of the insurance, \$300, and received an assignment of that amount under the note and mortgage, by virtue of the contract of subrogation contained in the policy. C brought suit against D for subrogation, for foreclosure of the mortgage, for personal judgment and for judgment on the note secured by the mortgage to the extent of the assignment and interest, and alleging that the fraction of the debt retained by B, upon the assignment of the part in suit, has been fully paid, the fact of payment being admitted by demurrer. Did the complaint state facts sufficient?

Held, that as the complaint contained the allegation of payment of the part of the debt held by B, B was not a necessary party to the action by C against D, B not being a party in interest.

Held, also, that the allegation of payment of the part of the indebtedness held by B after the assignment to C was essential to C's recovery and the protection of D against a multiplicity of suits.

SAME.—Necessary Party.—Variance in Description.—Insurance Policy.—Complaint.—Mortgage.—In such case the complaint and mortgage described the property as the s. w. qr. of section 23, tp. 31, range 8, while in the policy it was described as s. w. qr. of section 23, range 31, tp. 8.

Held, that upon the theory (arising upon the variance in description) that the complaint alleges a mortgage security upon one property and an insurance upon another, which other is presumed to have been destroyed as the property of A, A (the mortgagor and vendor) was a necessary party to the action, and not having been made a party, the complaint was fatally defective.

From the Whitley Circuit Court.

J. A. Finch, F. M. Finch, J. C. Wigent and B. E. Gates, for appellant.

T. R. Marshall, W. F. McNagney and P. H. Clugston, for appellees.

HACKNEY, J.—In the year 1885, one William McMannen owned a farm in Whitley county, which he

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mortgaged to the Ætna Life Insurance Company to secure a loan of one thousand dollars, and as a further security for said sum he procured from the appellant a policy of insurance upon the dwelling house, alleged to be situated upon said farm, in the sum of three hundred dollars.

In 1888, McMannen conveyed said lands to the appellee Stephen Martin, without the consent of the appellant and without any assignment of said policy of insurance, but upon the agreed consideration, in part, that said Martin should assume and pay the amount of said mortgage.

The policy contained the following provisions: "If the insured shall, by voluntary transfer or conveyance, dispose of the property covered by this policy, this policy may be assigned to the party or parties succeeding to the ownership of the property, provided the company shall first consent thereto by indorsement thereon, otherwise this insurance shall cease from date of such change in ownership."

"MORTGAGE CLAUSE.

"It is agreed that any loss or damage that may be ascertained and proved to be due under this policy to the assured, shall be held payable for the account of said assured to Ætna Life Insurance Company mortgagee, subject to the following stipulations:

"1. It is agreed that this insurance, as to the interests of the above-named mortgagee or beneficiary in the trust deed only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by voluntary transfer, legal process or conveyance of the property: *Provided*, that the mortgagee or

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beneficiary shall notify this company of any change of ownership, or increase of hazard, which shall come to the knowledge of such mortgagee or beneficiary, and shall have permission for such change of ownership, or such increased hazard, duly indorsed on this policy; *and, provided further*, that every increase of hazard not permitted to the mortgagor or owner shall be paid by the mortgagee or beneficiary, on reasonable demand, and after demand made by the company upon, and refusal by, the mortgagor or owner to pay according to the established scale of rates; the company reserving the right to cancel the policy at any time on the terms in said policy provided, on giving to the mortgagee ten (10) days' notice of their intention so to do, and after said ten (10) days this policy and this agreement shall be void. The foregoing stipulation, however, shall not be held under any circumstances to modify the terms of contribution provided in the printed conditions of this policy in case of other insurance on the same property, it being expressly understood that this insurance is upon the interest of said mortgagor or owner, and that other insurance upon the interest of the mortgagor or owner, or assigns, is to contribute according to said conditions.

"2. It is also agreed that whenever this company shall pay to the mortgagée or beneficiary any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party on the property in question, for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured, or this company, at its option, may pay to the mortgagee or beneficiary the whole

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of the debt so secured, including such sums as said mortgagee or beneficiary may then have paid for taxes or fire insurance upon the property described in such mortgage or trust deed, pursuant to the terms thereof, with all the interest that may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment is made an assignment and transfer of said debt, with all securities held by said party on the property in question, for payment thereof."

Soon after the sale to Martin the dwelling house was destroyed by fire, the appellant paid to the Ætna Life Insurance Company the amount of said insurance and received an assignment of the sum of "three hundred dollars by and under said mortgage by virtue of the contract of subrogation contained in said mortgage clause of said policy, together with interest from the date of said assignment, to be collected under said mortgage and subject only to the balance of said mortgage debt and interest due and to become due to said mortgagee, and also an assignment of said sum from and by indorsement upon the note of said McMannen to said Ætna Life Insurance Company. Upon these facts the appellant sued the appellee Stephen Martin, and his wife, the appellee Nancy Martin, in three paragraphs of complaint, the first seeking subrogation, personal judgment against said Stephen and foreclosure against both appellees, the second seeking only a foreclosure, and the third seeking only a judgment upon the note executed by McMannen to the Ætna Life Insurance Company to the extent of the sum of said assignment and interest.

The circuit court sustained the appellees' demurrer to each of said paragraphs of complaint, the causes of demurrer being that each paragraph failed to state facts sufficient to constitute a cause of action, and that there

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was a defect of parties defendant, in that said McManen, his wife, who joined him in said mortgage, and the Ætna Life Insurance Company were proper and necessary parties defendant.

The ruling upon said demurrer is the only alleged error presented by the record and briefs. The first objection by the appellees to the sufficiency of the complaint is upon the question of a defect of parties.

It is settled that assignments of parts of a debt are valid. *Groves v. Ruby*, 24 Ind. 418; *Wood v. Wallace*, 24 Ind. 226; *Lapping v. Duffy*, 47 Ind. 51; *Fordyce v. Nelson*, 91 Ind. 447; *Singleton v. O'Blenis*, 125 Ind. 151. But, as it was strongly intimated in *Lapping v. Duffy*, *supra*, the right to make and enforce such assignments does not subject the debtor to a separate action by each assignee of a fraction of the debt for the collection of such fraction, and, in the several cases cited, the proposition was recognized that the several fraction holders have such an interest in the whole debt, and the remedy for its enforcement, that they may prosecute a joint action upon the obligation.

In *Singleton v. O'Blenis*, *supra*, it was held that under the code requiring that "every action must be prosecuted in the name of the real party in interest," the assignor was a proper party plaintiff. If a proper party because a party in interest, that interest would, under the provision of the code quoted, make him a necessary party. Here, however, it is alleged that the fraction of the debt retained by the Ætna Insurance Company, upon the assignment of the part in suit, has been fully paid. It is a question, therefore, whether this allegation is sufficient to protect the debtor against a multiplicity of suits, or, at least, against one other suit by the Ætna Insurance Company, for the seven hundred dollars and interest of the debt. But for this allegation, we have no doubt, the

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assignor would be a necessary party. *Vance v. Evans*, 11 W. Va. 342 (382); *Currier v. Howard*, 80 Mass. (14 Gray) 511.

Since it is alleged that the assignor has been fully paid, and this fact is admitted by the demurrer, and there being no question of the validity or extent of the interest claimed by the appellant, as between the assignor and the assignee, the appellant would but have brought into the case a party whose costs would have become chargeable to the appellant. The fact so alleged and admitted was a fact in which the appellant had no interest further than to show that he was the absolute owner of the entire claim, and one of which the appellee possessed full and definite knowledge; it was a fact which, if doubt existed, the appellees could have determined by cross-bill, bringing the *Ætna Life Insurance Company* into court. If the fact was uncontroverted and free from doubt, no good purpose could have been served by making that company a party. In other words, upon that allegation we can say that the *Ætna* company was not a party in interest, and would, therefore, have been an unnecessary party. The alleged fact, however, was essential to appellant's recovery and the protection of appellees against a multiplicity of suits.

Another objection to the sufficiency of the complaint arises upon a difference in the description of the land as it is stated in the mortgage and the complaint, and as it is stated in the policy.

The complaint and the mortgage describe it as the east half of the southwest quarter of section 23, township 31, range 8, while in the policy it differs in the statement of the range as 31 and the township as 8.

If the exhibit of the policy, filed with the complaint, controls, as appellees urge, and if it must be held that the property mortgaged is not the same as that insured

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and destroyed, we are unable to observe how the status of the security for the debt would be different, but the allegation that the property described in the complaint was sold by McMannen and conveyed to Martin could not be held to include a conveyance of the property insured and destroyed so as to constitute an allegation of a breach of the condition in the policy against sales of the property without the consent of the appellant. In the absence of a breach of such condition, we are not advised of any support for the "claim that as to the mortgagor or owner, no liability existed" for the payment of such insurance, as provided in the "mortgage clause" numbered two. But if we concede the basis for an arbitrary claim of nonliability under the "mortgage clause," we are unable to observe how, under the allegations of the complaint, the interests of McMannen in the insurance upon his house, the obligation to him by Martin to pay the mortgage debt, and the subrogation of the appellant to the securities of the *Ætna Life Insurance Company* as against McMannen and Martin can be adjudicated and put at rest without making McMannen a party to the record.

Of the effect of the difference in descriptions, the appellant has not given us the benefit of any suggestion, and if we are incorrect in concluding that McMannen was a necessary party, the appellant should not complain. This conclusion—that McMannen should have been a party—is reached, it should be borne in mind, upon the theory that the complaint alleges a mortgage security upon one property and an insurance upon another, which other property is presumed to have been destroyed as the property of McMannen. We do not decide that the error, if an error, in description could not have been corrected, nor that McMannen would have been a necessary party to a foreclosure of the mortgage upon the land

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sold to Martin, but the basis of the appellant's claim is necessarily the insurance upon McMannen's property, to which McMannen is entitled either from the appellant or from Martin under his obligation to pay the mortgage debt.

A full determination of the right to enforce the appellant's claim renders it necessary to decide whether the insurance money was payable to the Ætna Life Insurance Company only in the event of the inadequacy of the mortgage security, and as this is a question in which McMannen is directly interested, it seems to us to make clear the conclusion that he was a necessary party, and not having been made a party, we conclude that the question of this right is not before us, as it is primarily a question between McMannen and the appellant, and but incidentally a question between Martin and the appellant.

The judgment of the circuit court is affirmed.

Filed May 15, 1894; petition for a rehearing overruled Nov. 16, 1894.

No. 16,900.

THOMPSON ET AL. v. THE CONNECTICUT MUTUAL LIFE
INSURANCE COMPANY ET AL.

APPEAL.—*Notice to Coparties.—Fixing Penalty of Bond and Naming Sureties in Term, but Filing in Vacation.*—Where at the time a judgment is rendered an appeal is prayed and granted upon the filing of a bond in a fixed sum, with named persons as sureties, within thirty days, and within that time, although the court is then in vacation, a bond is filed with the sureties and penalty as fixed by the court, the appeal so taken is a term time appeal, and no notice to the coparties not joining is necessary.

MORTGAGE.—*Subrogation.—Foreclosure.—Payment.—Extinguishment.*—Where the holder of a prior mortgage brings suit to foreclose it, making a junior mortgagee a party, and a decree of foreclosure is

139	325
142	447

139	325
149	192
150	496

139	325
154	403
155	651

139	325
160	91

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given, upon which there is a sale of the mortgaged land to the plaintiff, who takes a certificate of sale, and who, later, believing the junior mortgage cut out by the decree, accepts partial payment of his judgment and takes a new mortgage upon the land for the balance from an intervening purchaser, to whom he assigns the certificate of sale without any knowledge that such purchaser had agreed to pay off the incumbrances, the lien of the first mortgage is not extinguished by the execution of the second one for the same debt, but the former will be kept alive to protect its holder from the intervening lien. And, also, where a still later purchaser of the land, without knowledge of the intervening mortgage, applies for and secures a loan thereon from a third person, who likewise is ignorant of such mortgage and who believes that the second mortgage executed to the senior incumbrancer is the only lien upon the land, and a part of the loan so secured is used in paying off such lien, such last mortgagee is entitled to be subrogated to the rights of the holder of such lien to the extent of the money paid thereon out of the loan made by him, as against the intervening mortgagee and the persons succeeding to his rights with knowledge, and as to so much he is entitled to a first lien.

SPECIAL FINDINGS—Power of Court to Amend.—Cases Modified.—A trial judge may, in all cases, amend his special findings of facts and conclusions of law at any time before final judgment and during the period within which a bill of exceptions containing the evidence may be filed. *Wray v. Hill*, 85 Ind. 546, and decisions following that case, modified.

From the Lake Circuit Court.

B. Borders and *F. L. Dukes*, for appellants.

C. L. Holstein and *C. E. Barrett*, for appellee.

HOWARD, J.—This action was begun in the Pulaski Circuit Court, and was taken, on change of venue, to the court below. It was brought by the appellee, the Connecticut Mutual Life Insurance Company, against the appellees Gellinger and wife and Sourbeer and wife, to foreclose two mortgages, one against the Gellingers and one against the Sourbeers.

The appellants were also made defendants to assert any right which they might have. They filed their answer, and also a cross-complaint, to foreclose a mortgage

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set up by them against the insurance company, the Gellingers and the Sourbeers, all of whom answered the cross-complaint. Other pleadings were also filed.

The actions were consolidated. The court found that the insurance company had a first lien on the land in controversy, that the appellants had a second lien, and the company a third lien. A decree was entered accordingly, and the appellants then appealed to this court.

The insurance company, claiming that the appeal was not well brought, has filed a motion that it be dismissed, for the reason that the appeal bond was not approved by the court as required by law, and because notice to co-parties not appearing was not given.

The judgment appealed from was rendered in the Lake Circuit Court, December 22, 1892. On the same day the appeal was prayed, and was granted by the court upon the filing of an appeal bond in the sum of \$1,600, with John F. Borders and George W. Thompson as sureties. The time within which the bond should be filed was fixed at thirty days, which would extend until after the adjournment of the term of court. On January 18, 1893, in vacation of court, but within the thirty days allowed, the bond was filed, with the sureties and penalty as fixed by the court.

The questions, as raised by counsel on this motion, have not, as we believe, been expressly decided. We think, however, that the appeal so made was a term-time appeal, and was well taken, as provided by section 650, R. S. 1894 (section 638, R. S. 1881).

Judge Buskirk (Prac. 61), in stating what must be done to effect an appeal in term, under the statute, says:

"1. An appeal must be prayed for and granted by the court during the term of the court at which the judgment was rendered.

"2. The appeal bond must then be filed and approved

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by the court, or it must be filed within such time as the court may direct of record; but in either event the penalty of the bond must be fixed and the surety approved by the court.

"3. If the bond is not filed in term, the court must fix the penalty, * and direct in what time the bond must be filed.

"4. The bond must be filed within the time directed.

"5. The transcript must be filed in the office of the clerk of the Supreme Court within sixty days from the time the bond is filed."

This statement is approved as correct in Works' Prac., section 1088, and in Elliott's App. Proced., sections 247, 248, 249, 525 and notes. All these authorities hold, likewise, that where the appeal is taken during the term no notice is necessary.

In *Ex parte Sweeney*, 131 Ind. 81, it was adjudged: "That the filing of a bond is an essential step in perfecting a term appeal, and that where a bond is not filed within the time limited by the order granting the appeal, the appeal must be upon notice."

In *Holloran v. Midland R. W. Co.*, 129 Ind. 274, which, like this, was a case where a part of the coparties had appealed, and had failed to notify a coparty who had not joined in the appeal, it was said by the court that when the provisions of section 650, R. S. 1894 (section 638, R. S. 1881), providing for appeals in term time, are complied with, no notice is required; that "this section requires the fixing of the penalty of the bond and the surety to be given, and that the same be approved by the court"; and that "when the bond is given and other steps taken, as required by this section, within the time fixed by the court, no notice of appeal is necessary."

In that case, the court found that the appeal was not

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taken in term, in accordance with the provisions of section 650, *supra*; and also that notice was not given, in accordance with section 647, R. S. 1894 (section 635, R. S. 1881), and the appeal perfected within one year from the date of the final judgment. It was, therefore, held that the appeal must be dismissed.

It has long been held, that, in a term time appeal, no notice is required to be given to adversary parties. From the foregoing authorities, it is equally clear, that, in a term time appeal, no notice need be given to coparties not appealing.

All the parties, coparties no less than adverse parties, are before the court, either in person or by counsel or both, when judgment is rendered, and the appeal in term taken; and all are there equally bound to be informed of what occurs in due course in the proceedings. Elliott's App. Proced., section 173.

When service is made on coparties, or notice given them, the service is had, or the notice given, as in case of adverse parties. Elliott's App. Proced., section 181. No good reason can therefore be advanced why coparties should receive notice of an appeal taken in term any more than adverse parties. All being present in court must be held to take notice of what is there done in due course of business.

If the appeal in this case, then, was an appeal in term we conclude that no notice to the coparties not appealing was necessary. It is enough to name them in the record and in the assignment of errors as parties to the appeal.

But counsel say that the appeal was not taken in term, for the reason that the appeal bond, as it appears in the record, was not approved by the court.

The penalty of the bond was fixed, and the sureties were named by the court. The court also fixed the time

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within which the bond should be filed, and it was filed within that time, in the sum fixed by the court, and with the sureties named in the order of the court.

Under the authorities which we have cited, we think this was sufficient. By the fact of naming the sureties, the court did, in effect, approve of them as such sureties for the sum fixed in the bond. The appeal was, therefore a term time appeal, which was fully perfected as required by the statute. We must, consequently, notwithstanding the earnest and learned argument of counsel, still adhere to the former ruling of this court, in the cases of *Conaway v. Ascherman*, 94 Ind. 187, and *Wilson v. Bennett*, 132 Ind. 210, and hold that no notice was necessary to the coparties not joining in the appeal. The motion to dismiss the appeal is overruled.

While, under the various assignments of error, numerous questions in relation to the pleadings, and the rulings of court are discussed in the briefs of counsel, we are yet satisfied that the merits of this case may best be considered in an examination of the special findings of the court, and the conclusions of law made at the request of the defendants, which are as follows:

"1. The court finds from the evidence that on the 20th day of December, 1870, Christian Blockberger became the owner of the southwest quarter of section two, township thirty-one north of range two west, in Pulaski county, Indiana, containing one hundred and sixty acres; that on the 2d day of November, 1874, while owning said land he, by proper deed, in which his wife joined, conveyed said land to John Cupfer and Fritz Kupfer, who then became the owners in fee simple.

"2. The court finds that on the 14th day of August, 1877, John Kupfer, Maria E. Kupfer, his wife, and Fritz Kupfer, executed to the Aetna Life Insurance Company a mortgage on said land to secure a loan of \$800,

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and that said mortgage was duly recorded in the recorder's office of Pulaski county, Indiana, in Mortgage Record H, page 314, and was so recorded September 1, 1877.

"3. And the court further finds that on the 4th day of September, 1877, John Kupfer, Maria E. Kupfer, his wife, and Fritz Kupfer, executed to Christian Blockberger a mortgage on the southwest quarter of section two, township thirty-one north, of range two west, Pulaski county, Indiana, and also upon the north half of the northwest quarter of section eleven, in the same town and range, county, and State, to secure the payment of a note of the same date, made by said John and Fritz Kupfer to Christian Blockberger, calling for two hundred and seventy-three dollars and seventy-two cents, and six per cent. interest from date, due in three years; that said mortgage contained covenants of warranty, and also contained an express promise to pay the debt thereby secured without any relief from valuation or appraisement laws, and said mortgage was properly recorded in the mortgage records of Pulaski county, Indiana, on the 4th day of September, 1877, in the recorder's office of Pulaski county, Indiana, in Mortgage Record H, page 322.

"4. And the court finds that out of said sum of eight hundred dollars so loaned said Kupfer by said Aetna Life Insurance Company, and secured by the mortgage referred to in finding two herein, the said Kupfer paid to Christian Blockberger all of the purchase-money yet due him for said southwest quarter of section two, except the sum of two hundred and seventy-three dollars and seventy-two cents, and the mortgage referred to in finding number three was given for the said balance due said Blockberger, and it was expressly agreed in said mortgage to Blockberger that the same was subject to the

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eight hundred dollar mortgage to the Ætna Life Insurance Company.

"5. And the court finds that after John Kupfer became the owner of all the land described in the aforesaid Blockberger mortgage, and after the Ætna Life Insurance Company had foreclosed its mortgage as hereinafter set out, William H. Thompson made an agreement with said John Kupfer, that he, Thompson, would convey to said Kupfer a certain forty-seven acre tract in Pulaski county, Indiana, and said John Kupfer agreed that he would execute to said Thompson a mortgage upon said land for three hundred dollars, and would convey his equity of redemption in the said southwest quarter of section two and the north half of the northwest quarter of section eleven, township thirty-one north, range two west, in Pulaski county, Indiana, to whomsoever the said Thompson should direct, and the said Thompson agreed to have the incumbrances thereon paid when he should sell said lands, which incumbrances consisted of the aforesaid Blockberger mortgage and a judgment in favor of the Ætna Life Insurance Company, which said company had obtained upon the foreclosure of the aforesaid eight hundred dollar mortgage as hereinafter set out; said Thompson did not agree to pay any of said incumbrances. Kupfer at once entered into the possession of the forty-seven acres, and more than one year thereafter Thompson conveyed the same to him by deed.

"5½. The court finds that after the agreement between Kupfer and Thompson, as set out in number five herein, it was agreed that Kupfer would convey the land to Piper, and in lieu of his agreement to have the incumbrances paid when he sold the land, it was agreed that Piper should assume the payment of the incumbrances and the deed executed by Kupfer to Piper was executed in pursuance of the said agreement. The only evidence

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of such changing of the agreement between said Thompson and Kupfer being the deed from Kupfer to Piper.

"6. And the court further finds that the said *Ætna Life Insurance Company's* mortgage so executed by said Kupfer for eight hundred dollars became due by reason of the nonpayment thereof, with interest thereon, and suit was filed in the Pulaski Circuit Court against John Kupfer, Maria Kupfer, his wife, Fritz Kupfer, Christian Blockberger and others, to foreclose said mortgage; that a judgment and decree was entered in said action foreclosing said mortgage against each of said defendants, including said Christian Blockberger, and the court in said foreclosure proceedings found and decreed that all defendants, including said Christian Blockberger, had been duly notified of the filing and pendency of said action, and the said mortgage to said *Ætna Life Insurance Company* was duly foreclosed in said action against all of said defendants, and said land in section two, containing one hundred and sixty acres, ordered sold to pay the same, and said *Ætna* claim was held to be the first and best lien on said land; that on the 31st day of May, 1879, said land in section two was sold under said foreclosure proceedings to said *Ætna Life Insurance Company* for five hundred dollars, which left a personal debt over unpaid of about five hundred dollars; that a sheriff's certificate of sale was issued to said *Ætna Life Insurance Company*, reciting such sale, and conditioned for a deed if said land was not redeemed within the time allowed by law.

"7. And the court finds that on the 26th day of August, 1879, the defendant, William H. Thompson, in pursuance to his agreement with John Kupfer, as set out in finding number five herein, sold the whole two hundred and forty acres of land before described to Andrew J. Piper and Jesse Piper for two thousand seven hundred

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dollars, which sum said Pipers agreed to pay in the following manner, to wit:

"a. They agreed to pay to the *Ætna Life Insurance Company* the full amount then due said company, being one thousand eighty one dollars and forty-two cents, principal and interest, and costs necessary to redeem from aforesaid sheriff's sale, and the balance of the judgment yet held by said company against Kupfers.

"b. They agreed to pay the principal and interest of the Blockberger mortgage.

"c. They agreed to pay all taxes and to pay certain other judgments and costs, amounting to ninety-one dollars and ninety cents.

"d. They agreed to pay to Thompson four hundred and eighty-nine dollars, and

"e. To convey to said Thompson eighty acres of land in Nottaway county, Missouri, valued at seven hundred dollars.

"And, thereupon, at the request of the said Thompson and to carry out his agreement, as before set out, John Kupfer, by a warranty deed, in which his wife joined, conveyed said land to Andrew J. Piper and Jesse Piper, in which deed the following recital was inserted:

" 'This conveyance is made subject to a judgment in favor of the *Ætna Life Insurance Company*, of Hartford, Conn., amounting to one thousand, eighty-one dollars and forty-two cents, principal, interest, and costs, and also subject to taxes and two judgments and costs, amounting to ninety-one dollars and ninety cents, and also subject to a mortgage in favor of Christian Blockberger for two hundred and seventy-three dollars and seventy-two cents, and the interest thereon; all of which the grantees herein agree to pay as a part of the purchase-money for the above described real estate.' And said Pipers accepted said deed and caused the same to be properly re-

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corded in Pulaski county, Indiana, on the first day of September, 1879, and they took possession of the land therein described under said deed in the month of October, 1879; that prior to the execution of said deed the said John Kupfer never knew said Pipers or either of them, and never had any contract with them or either of them, and neither of said Pipers were present when said deed was signed; that the only contract which said Kupfer had with reference to the sale of the land to Piper, except the execution of a deed, was had with the said William Thompson. And the aforesaid recital in said deed was inserted therein at the instance of said Thompson; that the said deed from Kupfer to the said Pipers was by Kupfer delivered to said Thompson, and by Thompson delivered to Pipers; that Kupfer never received any part of the consideration which Piper paid for said land, but whatever part of the consideration for the said land which said Pipers paid was paid according to the recital of the said deed.

"8. And the court further finds that the land in section two was not redeemed from the sheriff's sale referred to in the finding, number six herein, within one year from the date of such sale, and that on or about the 20th day of September, 1880, Andrew J. Piper and Jesse Piper paid to the clerk of the Pulaski Circuit Court of Indiana, for the Ætna Life Insurance Company, three hundred and thirty-three dollars and thirty-three cents cash, and executed to said company a mortgage upon the said land in section two for eight hundred dollars, the same being accepted by the said Ætna Company in full satisfaction of the amount due the said company upon the judgment referred to in finding number six herein, and to redeem from the aforesaid sheriff's sale, and thereupon the said Ætna Company delivered to said Piper and Piper the certificate of purchase before issued to said company

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with a written assignment thereof thereto attached, and dated June 4, 1880, assigning said certificate to said Piper, who, on the same day, asked and received from the sheriff of Pulaski county, Indiana, a sheriff's deed in due form upon the said certificate for the said southwest quarter of section two, which deed was duly recorded on the next day in Pulaski county, Indiana; that the said assignment of the sheriff's certificate of sale was procured by said Piper and made by the said Ætna Life Insurance Company upon the advice of Mr. Nye, the attorney for said Piper, and said company, and the advice of Mr. Agnew, the clerk of Pulaski Circuit Court, and for the purpose, among other things, of cutting out and defeating the lien of the Blockberger mortgage, and said mortgage was properly recorded in Pulaski county, Indiana, September 21, 1880.

"9. And the court finds that on the 20th day of September, 1880, the said Jesse Piper, by deed in due form, conveyed his interest in the land in section two, aforesaid, to Andrew J. Piper.

"10. And the court finds that on November 21, 1885, Andrew J. Piper and wife, by a warranty deed, conveyed the said one hundred and sixty acres in section 2 to defendant herein, Henry M. Sourbeer, and the said Sourbeer, as a part of the price to be paid for said land, agreed to pay the Ætna Life Insurance Company mortgage of eight hundred dollars, and, at the time of the execution of said deed and the acceptance of said deed by said Sourbeer, he had no actual knowledge of the existence of the Blockberger mortgage.

"11. On the 9th day of February, 1886, the said Sourbeer, by a warranty deed, in which his wife joined, conveyed the west half of said southwest quarter of section 2 to the defendant Andrew J. Gellinger, and, as a part of the purchase-price of the same, the said Gellinger

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agreed to pay one-half of the aforesaid mortgage to the *Ætna Life Insurance Company*, and, at the time the said deed was so made and accepted, neither said Gellinger nor Sourbeer had any actual knowledge of the existence of the said Blockberger mortgage.

"12. Prior to the 11th day of May, 1889, the defendant Henry M. Sourbeer made an application in writing, through Mr. Barnett, of Winamac, Ind., to Winfield Miller, of Indianapolis, Ind., for a loan of five hundred and fifty dollars, and to secure the payment of the same offered a mortgage upon the east half of the southwest quarter of section 2, in township 31 north, range 2 west, in Pulaski county, Indiana, and, at the same time, the defendant Andrew J. Gellinger made a like application for the loan of a like amount, and offered as security for the same a mortgage upon the west half of the southwest quarter of said section 2. Upon the presentation of said applications to the said Miller, he came to Pulaski county and examined said lands for the purpose of ascertaining the value thereof, and after being satisfied with the security offered, the said Miller agreed to make the loan as asked for upon the showing of a sufficient title, and thereupon the said Sourbeer and Gellinger caused abstracts of title to be prepared for each of said tracts of land and forwarded to the said Miller at Indianapolis, and upon the receipt of said abstracts of title by said Miller, he submitted them to his attorney, Charles E. Barrett, for examination, and the said Barrett, after examining the said abstracts of title, and causing certain corrections to be made therein, believing in good faith that they showed a perfect title to the said lands to be in said Sourbeer and Gellinger, and believing in good faith that the only lien existing against said lands was the mortgage of the *Ætna Life Insurance Company*, executed

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on the 20th day of September, 1880, by Piper and Piper, gave to the said Miller and to the said plaintiff his opinion, as an attorney, that the said Sourbeer and Gellinger held said lands in fee simple by a perfect title, and that the only lien thereon was the said eight hundred dollars to the said Aetna Life Insurance Company, and thereupon the said Miller, believing and relying upon the opinion of said Barrett, and believing that said Sourbeer and Gellinger were the owners of said lands by perfect titles, and that there were no liens thereon except the said eight hundred dollar mortgage, prepared two notes for five hundred and fifty dollars each, and to each of said principal notes he attached ten coupon interest notes for nineteen dollars and twenty-five cents each, all bearing date May 11, 1889, and bearing interest at the rate of eight per cent. per annum after date, and providing for the payment of attorney's fees, and at the same time said Miller prepared a mortgage upon the east half of said one hundred and sixty acres, securing one of said principal interest notes and the ten coupon interest notes thereto attached, and another mortgage upon the west half of said land, securing the other of said principal note and the ten coupon interest notes thereto attached, all said notes and mortgages being payable to the plaintiff herein, and at the same time said Miller drew two drafts upon the plaintiff herein, the Connecticut Mutual Life Insurance Company, for five hundred and fifty dollars each, one being made payable to the defendant Gellinger, and immediately sent said notes, mortgages and drafts to Mr. Barnett, at Winamac, Indiana. Upon the receipt of said papers at Winamac, the said Henry M. Sourbeer executed one of said principal notes, and the ten coupon interest notes thereto attached, and indorsed the draft payable to him, and he and his wife executed the said mortgage securing the

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said notes, and the defendant Gellinger executed one of said principal notes and the ten coupon notes thereto attached, and indorsed the draft payable to him, and he and his wife executed a mortgage securing the same, and thereupon the said Barnett caused the said mortgages to be properly recorded, and, together with the said notes, to be returned to the said Winfield Miller, and he cashed said drafts, and, out of the money received therefrom, paid to the agent of the *Ætna* Life Insurance Company, nine hundred and forty-five dollars and fifty-five cents, which sum was accepted by said company in full satisfaction of the amount then due upon the mortgage executed September 20, 1880, by said Piper and Piper, and on the 1st day of June, 1889, said *Ætna* Company executed a proper release of the mortgage, and caused the same to be properly recorded June 5, 1889, and the court finds that throughout the whole of the transaction, before set out in this finding, the said Mr. Barnett was the agent of the defendants Sourbeer and Gellinger, and all of his acts herein were done as the agent of said defendants, and he was at no time the agent of the plaintiff or of Winfield Miller, and that said Winfield Miller was the agent of the plaintiff; that said Barrett was the attorney for said plaintiff and for said Miller; that the plaintiff had no actual knowledge of the condition of the title to the lands or of the existence of the Blockberger mortgage, but acted upon the representations of its agent and attorney, and believed, at the time it was making said loan, that it was acquiring the first lien upon the lands described in the said mortgages; that by default in the payment of the interest, both of said mortgages are now due, and there is due from the said Sourbeer to the plaintiff, the sum of six hundred and sixty dollars and four cents, and from the said Gellinger the sum of six hundred and sixty dollars and four cents, which

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sums are liens upon the lands described in the respective mortgages, and are collectible without relief from valuation or appraisement laws.

"13. And the court further finds that this action was commenced by the plaintiff on the 5th day of September, 1891, and that notice of the pendency thereof was served upon the defendant, Christian Blockberger; that after the service of said process, and before the said Blockberger had appeared to the said suit, he sold his aforesaid note and mortgage to the defendants and cross-complainants, William H. Thompson, Burlingame Borders, and Frank L. Dukes, for sixty dollars, which sum was paid, one-half by said Thompson, and one-half by said Borders and Dukes, and, by agreement between the said parties, the said note and mortgage was by said Blockberger assigned in writing to the said Thompson, who agreed to take and hold said note and mortgage for the benefit of himself and said Borders and Dukes, he owning one-half, and Borders and Dukes the other half; that said assignment was properly recorded in Pulaski county, Indiana, April 27, 1892, and the same was executed by the said Blockberger and properly acknowledged on the 5th day of November, 1891; that there is due and unpaid upon said mortgage the sum of five hundred and twenty dollars, and the same is a lien upon the said southwest quarter of said section two, in township thirty-one north, range two west, in Pulaski county, Indiana, and collectible without relief from valuation or appraisement laws.

"(Signed)

JOHN H. GILLET, *Judge.*

"And now, after the court had announced and filed its finding herein as above, the plaintiff moves the court for a supplemental finding herein as to the rate of interest the amount paid the *Ætna* Life Insurance Company

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should bear, and the court sustains said motion, and now makes the following supplemental finding, to wit:

“And the court further finds that the mortgage to the *Ætna Life Insurance Company*, paid by and with the money of the plaintiff, as hereinbefore and hereinabove found by the court, was, at the time of its payment, bearing seven per cent. interest, but that the plaintiff is entitled to recover only the legal rate of interest, to wit, six per cent., from the date of payment to this date.

“And the defendants, *Thompson, Borders and Dukes*, object to such supplemental finding, and which objection is by the court overruled, and to which ruling of the court the defendants aforesaid objected and excepted, and thereupon the court announced its conclusions of law herein in these words:

“1. And as a conclusion of law the court finds that the plaintiff is entitled to be subrogated to the lien of the *Ætna* mortgage, which amounted at the date of payment thereof, May 11, 1889, to nine hundred and forty-five dollars and fifty-five cents, with six per cent. interest thereon from said date and now amounting to one thousand one hundred and thirty-six dollars, and that said sum is the first and best lien on said southwest quarter of section two, township thirty-one north, range two west, in *Pulaski county, Indiana*.

“And as a further conclusion of law the court finds that *William H. Thompson, Burlingame Borders and Frank L. Dukes* have the second lien on said described land for the sum of five hundred and twenty dollars; and as a further conclusion of law the court finds that the plaintiff has a third lien on the east half of said land for ninety-four dollars and four cents; and as a further conclusion of law the court finds that the plaintiff has a third lien on the west half of said lands for ninety-four

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dollars and four cents, and that all said sums are payable without relief from valuation or appraisement laws.

"And as a further conclusion of law the court finds that said mortgaged lands should be sold, and that the plaintiff, the Connecticut Mutual Life Insurance Company, should be first paid out of the proceeds of such sale the sum of one thousand one hundred and thirty-six dollars, with six per cent. interest from this date.

"2. That the plaintiff's costs and costs of sale should next be paid.

"3. That the defendants, Thompson, Borders and Dukes should then be paid the sum of five hundred and twenty dollars, with six per cent. interest from this date.

"4. That the costs of Thompson, Borders and Dukes should then be paid.

"5. That the plaintiff, from the proceeds derived from the sale of the west half of said land, be paid ninety-four dollars and four cents, and out of the east half of said lands ninety-four dollars and four cents, with six per cent. interest on said sums from this date.

"And the court further finds that the plaintiff is entitled to recover from the defendants, Thompson, Borders and Dukes, its costs herein upon the issues joined between the plaintiff and said defendants, and is entitled to recover from the defendants, Sourbeer and Gellinger, its costs herein.

"And the court further finds, as a conclusion of law herein, that Christian Blockberger has no interest in the subject-matter herein, he having assigned all his interest to said Thompson, Borders and Dukes.

"(Signed) JOHN H. GILLET, *Judge.*"

It is first contended by appellants that the facts found do not show a right in the Connecticut Mutual Life Insurance Company to be subrogated to the rights of the Aetna Insurance Company's mortgages.

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It appears, from the second and third findings of the court, that the first *Ætna* mortgage, given by the Kupfers, then owners of the land in controversy, on the 14th day of August, 1877, was a superior lien to the Blockberger mortgage, given by the same owners on September 4, 1877.

By the sixth finding, it appears that the *Ætna* company foreclosed its first mortgage against the owners of the land and others, including Christian Blockberger, holder of the junior mortgage, and that, on the 31st of May, 1879, the land was sold at sheriff's sale and a certificate given to the *Ætna* company.

From finding seven, it appears that on August 26, 1879, the Kupfers sold the land to the Pipers, subject to the *Ætna* and also to the Blockberger mortgage, both of which, together with other liens, Pipers agreed to pay, as part of the purchase-price of the land. This assumption of payment was recited in the deed of conveyance from Kupfers to Pipers.

From the eighth finding, we learn that on or about September 20, 1880, the Pipers paid to the clerk of the Pulaski Circuit Court, for the *Ætna* company, three hundred and thirty-three dollars and thirty-three cents, and also executed to the company a mortgage on the land for eight hundred dollars, "the same being accepted by the said *Ætna* company in full satisfaction of the amount found due the said company upon the judgment referred to in finding number six herein, and to redeem from the aforesaid sheriff's sale."

This finding shows further that the company then assigned its sheriff's certificate to the Pipers, upon which they took out a sheriff's deed for the land. The purpose in receiving the sheriff's certificate and deed was to cut off the lien of the Blockberger mortgage.

Appellants, who have succeeded to the ownership of

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the Blockberger mortgage contend that these findings show that the first Ætna mortgage was released and fully discharged by the payment made and the new mortgage given by the Pipers, and that consequently the Blockberger mortgage had priority of lien over the second Ætna mortgage.

Appellee, the Connecticut company, contends, on the other hand, that the second Ætna mortgage debt was a renewal of a part of the first, and that the lien of the first mortgage was not lost, but was retained, together with the priority thereof, in the second mortgage.

The principle on which a prior lien is preserved for the security of a creditor who renews his credit as an accommodation to the debtor, is not different from the principle of subrogation.

The question here is, whether the first Ætna mortgage debt was paid and canceled, or whether it was renewed and the lien preserved in the second mortgage.

It is true, as was said in *Shinn v. Budd*, 14 N. J. Eq. 234, that "Subrogation, as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer."

To the same effect, see *Gadsden v. Brown*, 1 Speer's Eq. (S. C.) 37; *Sheldon Subrogation*, sections 1, 2, 3, 5, 240; *Webster's Appeal*, 86 Pa. St. 409; *Hoover v. Epler*, 52 Pa. St. 522; *Pomeroy's Eq. Juris.*, sections 1212 and 1213, and notes; *Suppiger v. Garrels*, 20 Ill. App. 625.

In *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, it is said that the person seeking subrogation must have paid the debt of another under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor.

The decisions of this State are to the same effect as to

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volunteers, and hold, substantially, that it is only in case where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, or in virtue of legal process, that equity, as a matter of course and without special agreement, substitutes him in the place of the creditor; and that, in the absence of an agreement to that effect, a stranger paying the debt of another, will not be subrogated to the creditor's rights. Payment by such stranger absolutely extinguishes the debt. *Richmond v. Marston*, 15 Ind. 134; *Spray v. Rodman*, 43 Ind. 225; *McClure v. Andrews*, 68 Ind. 97; *Binford, Admr., v. Adams, Admr.*, 104 Ind. 41.

From a consideration of the foregoing authorities it might seem that when the Ætna company received part payment in cash of its first mortgage debt, and took a mortgage to secure the balance, that alone, without any special agreement operated as an extinguishment of the first debt, and of the mortgage lien securing it. This would doubtless be the case if there were no intervening equity, on account of which the lien of the first mortgage ought to be kept alive.

We think there was such an equity. When the Ætna company foreclosed its first mortgage, it made Christian Blockberger a party, and had judgment of foreclosure against him. His mortgage was, on its face, made junior to the Ætna mortgage. When, therefore, the company took from the owners of the land part payment, and a new mortgage for the original mortgage debt, and when besides it attempted to give to the owners cumulative title by assigning to them, and so keeping alive its sheriff's certificate, it seems clear that the company was of opinion that the Blockberger mortgage was cut out by its foreclosure proceedings, and that, consequently, its new mortgage would be a first lien. Other-

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wise it is plain that the company would not have surrendered its sheriff's certificate and accepted a junior mortgage in place of the senior mortgage which it had already foreclosed. Equity; therefore, will interpose in the interests of simple right and justice to preserve to the company its first lien upon the land.

The Aetna company was evidently in ignorance of the fact that the Pipers, as owners of the land, had assumed payment of the Blockberger mortgage, and that on payment and release of the first Aetna mortgage the Blockberger mortgage would become a first lien, and prior to the lien of the second Aetna mortgage.

In *Sidener v. Pavey*, 77 Ind. 241, it was said that, "when a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity, and given its original priority as a lien, where the rights of innocent third parties will not be affected." Citing *Jones Mort.*, section 971, and *Bruse v. Nelson*, 35 Iowa, 157.

There were no innocent third parties in this case whose rights would be affected. Blockberger and those who have since succeeded to his rights are all shown to have been aware of the foreclosure and other proceedings in relation to the mortgages.

The same authority, *Sidener v. Pavey*, *supra*, citing numerous authorities, says that a court of equity will keep an incumbrance alive, or consider it extinguished, as will best subserve the purposes of justice, and the actual and just intention of the party. It is further said in that case, citing authorities, that in cases of fraud or mistake, a third person who pays the mortgage at the request of the debtor, and takes a new mortgage for the same debt, will be subrogated to the rights of the original mortgagee, as against intervening incumbrances existing at the time of the cancellation of the first mortgage.

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The lien of the first Ætna mortgage was therefore not extinguished by the giving of the second Ætna mortgage for the same debt, but was kept alive to protect its holder from the intervening lien of the Blockberger mortgage.

What we have said as to the lien of the Ætna mortgages applies also to the lien of the Connecticut Insurance Company's mortgage, as appears from other findings. From the tenth and eleventh findings it appears that the appellees Gellinger and Sourbeer, who, as owners of the land, applied for and received the loan secured by the Connecticut company's mortgage, had no knowledge of the Blockberger mortgage.

By the twelfth finding we learn that the same ignorance existed on the part of the Connecticut company when they took their mortgage and made their loan. The advice of the company's attorney, deceived no doubt as a result of the original Ætna foreclosure proceedings, seems to have been relied upon, and with reason, by the company. The company, as we think appears clearly from the findings, honestly believed, and had good reason to believe, although actually mistaken, that the second Ætna mortgage was the only lien upon the land.

In *Green v. Milbank*, 3 Abbott's New Cases, 138, the court held that when parties advanced money to take up a mortgage "upon the understanding and belief that there was no lien upon the premises but that mortgage," it is but just and equitable that such parties should be subrogated to the rights of the mortgage so taken up.

In *Barnes v. Mott*, 64 N. Y. 397, there was a like holding.

Johnson v. Barrett, 117 Ind. 551, was a case where a husband and wife executed a mortgage upon the husband's land. The land was subsequently conveyed to the wife, who died shortly after a judgment of foreclos-

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ure was rendered on the mortgage, leaving her husband and children surviving. It was held that one who, at the husband's solicitation and on his representation that the title was in him, and without knowledge to the contrary, paid the amount of the mortgage judgment, and caused satisfaction to be entered, taking the husband's note and mortgage for the amount so advanced, was entitled to subrogation to the rights of the first mortgage.

In the same case it was held that where a mortgage is executed to raise money to discharge a prior incumbrance, and the money is so applied, the mortgagee becomes entitled to be subrogated to the rights of the prior incumbrancer when such subrogation is made necessary for the better security of his mortgage debt. Citing *Gilbert v. Gilbert*, 39 Iowa, 657.

For further authorities to the effect that, under the equitable principle of subrogation, one who pays a mortgage debt under an agreement for an assignment of the old mortgage, or for a new mortgage for his own benefit or protection, acquires a right to the security held by the first mortgagee. See *Dixon Subrogation*, section 165; *Harris Subrogation*, sections 811, 816; *Tradesmen's Building, etc., Ass'n v. Thompson*, 32 N. J. Eq. 133; *Emigrant Industrial Savings Bank v. Clute*, 33 Hun, 82; *Emmert v. Thompson*, 49 Minn. 386; *Homeopathic, etc., Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Gans v. Thieme*, 93 N. Y. 225; *Moore v. Lindsey*, 52 Mo. App. 474; *Norton v. Highleyman*, 88 Mo. 621; *Hough v. Aetna Life Ins. Co.*, 57 Ill. 318; *Detroit Fire Ins. Co. v. Aspinall*, 48 Mich. 238; *Walters v. Walters*, 73 Ind. 425; *Pouder v. Ritzinger*, 102 Ind. 571, and *Pouder v. Ritzinger*, 119 Ind. 597.

We conclude that the lien of the Aetna company's first mortgage was not extinguished, but was kept alive in the second Aetna mortgage, as against the lien of the Blockberger mortgage; and, also, that the appellee, the

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Connecticut Insurance Company, in loaning its money for the payment of the second Ætna mortgage, was subrogated to the rights of the holder of that mortgage, to the extent of the debt due and paid to the Ætna Insurance Company out of the money so loaned, being, as found by the court in its twelfth finding, "nine hundred and forty-five dollars and fifty-five cents, which sum was accepted by said company in full satisfaction of the amount then due upon the mortgage executed September 20, 1880," and that the amount so paid, with interest, is, consequently, a first lien on the land in question in favor of said appellee.

It appears that "after the court had announced and filed its finding herein," the appellee insurance company moved the court for a supplemental finding as to the rate of interest which the amount paid the Ætna Insurance Company should bear, and that the court sustained said motion and made an additional finding of facts, over the objection and exception of appellants.

Counsel for the appellee company have offered no explanation or defense of this action of the court, not even referring to it in their otherwise well considered brief.

It must be admitted that there is serious conflict in the decisions of this court upon the question.

It is provided, in section 560, R. S. 1894 (section 551, R. S. 1881), that "Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case, the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly."

In the case of *Wray v. Hill*, 85 Ind. 546, this court,

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in considering the foregoing provisions, said: "The statute evidently means that the finding of the court upon a question of fact shall stand upon substantially the same footing as the verdict of a jury, for the provisions concerning new trials apply as well to the decisions of the court upon questions of fact as to the verdicts of juries. The adjudged cases proceed upon this theory, for it is uniformly held that where a special finding is defective, the remedy is by motion for a *venire de novo*, and that where the facts are not correctly found, the method of procedure is on a motion for a new trial."

Following the decision in *Wray v. Hill*, *supra*, it would seem that the action of the court here complained of was error, and that the failure to find as to interest should have been reached in a motion for a new trial, and not by motion for additional or supplemental finding.

But, in a later decision, *Knox v. Trafale*, 94 Ind. 346, the court, in considering the same question, said: "Under this statute, when a case is tried by the court, a special finding is similar to a special verdict when the case is tried by a jury. Upon the return of a special verdict by a jury, either party has a right to object to the same, and move the court to have the jury to make it more specific, or to move to strike out any part of it, or to require the jury to state further the facts of any issue omitted, and we see no reason why the same rights should not extend to a special finding made by the court."

If we had but these two decisions to consider, we should perhaps be able to reconcile them, and conclude that a special finding, like a special verdict, might be amended on motion, or, on failure to so amend, that the complaining party might also resort to a motion for a new trial for the same purpose.

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The statutes themselves would seem to bear out such a conclusion. It is provided, in section 561, R. S. 1894 (section 552, R. S. 1881), that "The provisions of this code respecting trials by jury apply, so far as they are applicable, to trials by the court."

A jury, at any time before its discharge from the consideration of a case, may amend its verdict; and no reason suggests itself why this provision is not applicable to a trial by the court, and why, therefore, the court may not at any time during the term, and before judgment, amend its finding so as to make the same conform to the facts proved.

In *Hartlepp v. Whitely, etc., Co.*, 131 Ind. 543, there seems to have been an uncertainty manifested by the court concerning the proper practice as to amending the finding before entering judgment. It is there said: "The court can not amend and supply defects in a special finding, on motion of one of the parties to a suit, after the rendition of the judgment, even if it could do so before judgment."

The same uncertainty was manifested in *Barnhill v. Mill Spring, etc., Gravel Road Co.*, 51 Ind. 354, where a motion to make the special finding more specific and full had been overruled. Inasmuch, however, as the motion was not accompanied with a statement of the alleged defects, this court refused to pass upon the correctness of the ruling below, saying: "If, then, it is a proper practice to present the question by a motion that the court make the special finding more full and complete, we think the alleged omissions should be pointed out to the court."

In jurisdictions having statutes similar to our own for the trial of causes by the court, it seems that the current of the decisions is to the effect that amendments to the special findings may be made at any time before judgment,

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and in some cases even after judgment, on motion or exceptions filed.

The Dakota statute, sections 266, 267, code (sections 5066, 5067, R. S. 1887), provides for written findings and conclusions, as does ours, the only material difference being that by our statute the judge may take his finding under advisement for not more than sixty days after submission, whereas by the Dakota, as also by the California statute, the time given is only thirty days.

The Supreme Court of the United States, in considering a case under the Dakota statute, *North v. Peters*, 138 U. S. 271, said:

"The appellant, in support of his motion for a new trial, claimed that the court had omitted to find upon certain material issues in the case. The court refused to grant the motion, and made additional findings, more explicitly responsive to the questions presented by the pleadings. We are of opinion that the court, if, in the consideration of such a motion, it considers that material findings have been omitted or imperfectly stated, has authority to make such additional findings as will cure the omission, so that its record will be amended, and made to conform to the truth."

The opposite view, the court continued, is "contrary to adjudged cases, on like questions, in the highest courts of those States whose statutory provisions respecting the trial by the court of questions of fact correspond in almost every particular with sections 266, 267, of the Dakota code, *supra*."

These authorities hold that the omission to file findings of fact, judgment having been entered, is an irregularity which the court has authority to cure by supplying additional amendments until an appeal is taken, or a bill of exceptions is settled and signed by the judge. *Williams v. Ely*, 13 Wis. 1; *Pratalongo v. Larco*, 47 Cal.

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378; *Ogburn v. Conner*, 46 Cal. 346; *Bosquett v. Crane*, 51 Cal. 505; *Hayes v. Wetherbee*, 60 Cal. 396; *Swanstrom v. Marvin*, 38 Minn. 359; *Vermule v. Shaw*, 4 Cal. 214."

The Minnesota and Wisconsin cases cited hold that such amendments to the findings may be made, *nunc pro tunc*, after judgment.

In California it is held that the court can not reëxamine the evidence on the motion of one of the parties after it has once filed its findings and rendered judgment, and on such reëxamination substitute different findings of fact and reverse its former decision. *Prince v. Lynch*, 38 Cal. 528.

It is, however, held to be the duty of the court to supply an omission when its attention is called to the subject by proper exception to the findings. *Logan v. Hale*, 42 Cal. 645.

It has also been there decided that findings by the court can not be amended after the entry of judgment, and the overruling of a motion for a new trial. *Bate v. Miller*, 63 Cal. 233.

But the question has never been more directly decided in favor of such amendment of special findings on motion or exception than by this court, in the case of *Gulick v. Connely*, 42 Ind. 134, a case which seems to have been quite overlooked in our recent decisions.

In that case, pending a motion for a *venire de novo*, the court made an amendment to its special findings, and, in considering the correctness of the ruling upon the motion for a *venire de novo*, this court said:

"It is very earnestly insisted by counsel for appellant, that in deciding upon this question, we can only look to the original special findings of the court, for the reason that the court, having made and filed his findings, possessed no power to make any addition thereto. We think

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the objection is untenable. We are unable to see any valid objection to the action of the court. The special finding of the court stands upon different grounds than the verdict of a jury, but even a jury, before its discharge, may be required to correct and perfect the verdict or answers to interrogatories. The same judge, ordinarily, presides during the entire term, and if he should, in the hurry of business, omit to find upon one of the issues, no injury can result, in permitting him, during the term, to correct his finding."

No good reason, so far as we have been able to discover, has been advanced to show why the court should not correct its own special finding, any more than any other record made by the court.

Our procedure under the present constitution seems to have been molded with special reference to the avoiding of the rigid rules of the common law wherever they interfered with what should be the object and end of all litigation, namely, the speedy and just decision of causes. Whatever, therefore, tends to a fair and just decision, with the least possible expense, annoyance and delay to litigants, must be in harmony with the spirit of our code.

In section 670, R. S. 1894 (section 658, R. S. 1881), it is provided, amongst other things, that "no judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance, or imperfections contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below."

In section 401, R. S. 1894 (section 398, R. S. 1881), it is provided that "the court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party."

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In section 399, R. S. 1894 (section 396, R. S. 1881), it is provided that the court may "supply an omission in any proceedings, on complaint or motion filed within two years."

Indeed, this last section alone seems broad enough to directly authorize the amendment which we are considering. The words are: "Supply an omission in any proceedings, on * * * motion filed." The finding of the facts in the case was, without doubt, a "proceeding" in the court. There was an inadvertent "omission" by the court to find as to the interest upon the amount due; and the appellee made its "motion" to "supply" the "omission."

It is true that an error in a special finding may be reached by a motion for a new trial; but if the court may itself, on motion, make correction of the mistake, it would seem that the exercise of such power would be in the interests of justice and fair dealing. Litigants ought to be saved the needless delay and expense of a retrial, if justice may be attained as well without it.

The twelfth section of our bill of rights requires that "Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

Certainly this requirement would be promoted by allowing a trial judge to correct a mistake made in his findings, where, as in the present case, there could be no question that the correction ought to be made.

In *Parker v. State, ex rel.*, 133 Ind. 178 (216), the power of this court to correct its own mistakes was strongly asserted, and the authorities cited. No reason is apparent why like power is not inherent in trial courts.

The right of the court to amend an inadvertence in its own finding, so as to make the facts found conform to the truth, is quite a different thing from the right of a

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party to have a finding corrected so as to make it conform to his own views as to the weight of the evidence. If the court is of opinion that the facts found are in accordance with the evidence, and that no oversight or mistake has been made, then the party has no right to set up his own judgment against that of the court, and ask that the finding be modified or the decision changed. That would be to substitute the views of a party litigant for those of the court trying the case.

In such case, if the party believe the court to be in error, he can proceed only by motion for a new trial, with a view to appeal to a higher tribunal, as shown in *Radabaugh v. Silvers, Admr.*, 135 Ind. 605 (610), and cases there cited. In that way only can the matured decision of the court be changed. *Prince v. Lynch, supra.*

The correction of an inadvertent mistake, however, either on motion of a party or by the court on its own motion, so as, in the opinion of the court, to make the finding conform to the facts proved, is quite another thing.

We are, therefore, of opinion that the trial judge should, in all cases, be permitted to amend his special findings and conclusions of law, at any time before final judgment and during the period within which a bill of exceptions containing the evidence may be filed; and, consequently, that the case of *Wray v. Hill, supra*, and all our decisions following that case must be modified accordingly.

The court, therefore, did not err in making its supplemental finding of facts in this case.

It is also contended in this case that the court erred in its conclusions of law that appellee's debt should be collected without relief from appraisal; that there was no finding on that point. In this, counsel are in error. In its twelfth finding the court found that appellee's

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mortgage debt was collectible without relief from valuation or appraisement laws.

Counsel for appellee contend that the conclusions of law should be restated so as to hold that the Blockberger mortgage is not a second lien on the land in question. The action of the court, however, was correct in this particular. The Pipers, in their deed of purchase, assumed the payment of this debt as well as that due the Ætna company. The Pipers were owners of the land by virtue of that deed. The deed from the sheriff, at most, improved their title only by cutting off all liens not assumed by them in their deed from the Kupfers.

We find no available error in the record.

The judgment is affirmed.

Filed Nov. 13, 1894.

No. 16,364.

**THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. BURTON, ADMINISTRATRIX.**

NEGLIGENCE.—Damages.—Action by Administratrix.—Averment that Plaintiff was Free from Fault Not Necessary.—It is not necessary to allege in a complaint by a wife, as administratrix, to recover damages for negligently causing the death of her husband, that she was free from fault.

SAME.—Averment as to Inability to See and Hear.—Effect of.—In a complaint to recover for negligently causing the death of the plaintiff's decedent at a railroad crossing, an allegation that the deceased was "unable to see or hear any engine or train of cars in motion on account of" certain described obstructions, is equivalent to an allegation that he did not see or hear the engine or train.

SAME.—Contributory Negligence.—Pleading.—When Specific Controls General Allegation.—A specific allegation will not control a general allegation of freedom from contributory negligence unless the specific allegation appears to include all of the occurrence and

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stands in conflict with that otherwise embraced in the general allegation.

RAILROAD.—Street Crossing.—Obstructions.—Finding as to How Far Trains Could be Seen.—Negligence.—Where one driving along a street which crosses two parallel railroad tracks, thirty-five feet apart, exercises due care in approaching and passing the first track, which is a side track, with cars standing thereon so as to obstruct the view of the main track, and then looks and discovers a train, which has not given the required signals, rapidly approaching upon the main track, and makes every possible effort to avoid a collision, it is immaterial how far he could have seen the train when he had crossed the side track, and a refusal to require the jury to make a finding upon that point is not error.

SAME.—Killing at Street Crossing.—Neglect to Give Signals.—Limit of Damages.—Statute Repealed.—The act of March 29, 1879 (Acts 1879, p. 173; R. S. 1881, section 4020, *et seq.*), in so far as it fixes the damages recoverable for injuries caused by the failure of a railroad company to give certain signals at a highway crossing at five thousand dollars, was repealed by the general act of April 7, 1881 (R. S. 1881, section 284; R. S. 1894, section 285), fixing the limit of damages in all actions for death by the wrongful act of another at ten thousand dollars.

SAME.—Care Required of Traveler at Crossing.—Care Stated.—Omission of Signals.—Contributory Negligence.—One who is about to cross over a railroad track at a street crossing is only required to exercise prudence and caution in proportion to the dangers incident to the crossing, with its obstructions and peculiar hazards; and so one who, being in possession of all of his faculties, drives toward a crossing with care, stops and looks and listens at a parallel side track thirty-five feet distant from the main track, but can hear no approaching train and can see none by reason of obstructing cars upon the side track, passes over the side track, again looks and listens and then cautiously approaches the main track and when near it discovers a rapidly approaching train, which so frightens his ordinarily gentle horses that, notwithstanding his strongest efforts, they run forward upon the track and the driver is killed, is not guilty of negligence, and damages may be recovered where it appears that the defendant's servants in charge of the train negligently omitted to give the signals required by law.

DAMAGES.—What Damages Not Excessive.—A recovery of nine thousand four hundred dollars for the wrongful killing of an industrious and frugal farmer, in good health, with an expectancy of thirty-eight years, who leaves surviving a wife and infant child, can not, on appeal, be said to be excessive.

SPECIAL VERDICT.—Instruction as to.—Where the trial court submits

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two forms of special verdict with instruction to take either or modify either, or write one for themselves, but that they would "hardly be driven to this labor unless neither of the forms submitted states the facts proved in the form you prefer to state them," the instruction is not open to the objection that it intimates to the jury that they should adopt one or the other of the forms submitted.

SAME.—Preponderance of Evidence.—Effect of Omission to Find Fact.—

An instruction that "if, on any material fact, the evidence is equal, so that there is no preponderance, you are not at liberty to find and state that fact in your special verdict," is not erroneous, as the failure to state the existence of a fact is equivalent to a finding that the fact is not proved by a preponderance of the evidence.

SAME.—Instruction as to What Should be Returned.—An instruction to a jury, where a special verdict is demanded, that all facts asserted by the plaintiff, if proved, should be returned and the facts asserted and not proved should be omitted, is correct.

SAME.—Instruction as to Forms Submitted.—An instruction to a jury who are directed to return a special verdict, that "You are not required to find any fact to be proved because you find the same suggested in a verdict, or in the verdict of the party you desire to favor," and that "If you do not consider that one of the forms submitted to you speaks the truth, as you understand it, you can not adopt it as your verdict," is not, properly construed, erroneous.

SAME.—Conclusions Disregarded.—A mere conclusion stated in a special verdict as a finding will be disregarded.

From the Cass Circuit Court.

N. O. Ross and *G. E. Ross*, for appellant.

J. C. Nelson, *Q. A. Myers*, *S. T. McConnell* and *A. G. Jenkins*, for appellee.

HACKNEY, J.—The appellee, as administratrix of the estate of her deceased husband, Thomas S. Burton, sued to recover damages for negligently causing the death of said Thomas at the crossing of the appellant's railway and Center street, in the incorporated town of Royal Center.

The complaint alleges that the deceased, while attempting to cross said railway in his buggy, approached the crossing from the east on said street and drove his team in a slow walk and looked and listened, but "was

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unable to see or hear any engine or train of cars in motion on account of the obstruction of his view by cars and trains of cars then and there standing upon the side tracks, which the said defendant had then and there negligently permitted to be and remain there; and on account of adjacent buildings and fences that intervened."

In addition to the allegation of negligence in obstructing the view by cars, it was alleged that the appellant negligently failed to give any signal or warning of the approach of its engine and train, by sounding the whistle or ringing the bell in the manner and within the distances from said crossing, as required by law as to such signals, and that its train was negligently run at the rate of fifty miles an hour upon said crossing and against the buggy and team driven by the deceased, and in the collision thereby the said Thomas was killed. The allegation of noncontributory negligence by the deceased is repeated as to each charge of negligence against the company and as to all of the occurrences generally.

Two objections are urged against the complaint; first, that it is not alleged that *plaintiff*, the widow, was free from fault, and, second, that the allegation that the deceased was "unable to see or hear any engine or train of cars in motion on account of" said obstructions, was not equivalent to the fact that he could not or did not see or hear the train before going upon the track.

As sustaining the first of these objections are cited *Louisville, etc., R. W. Co. v. Boland*, 53 Ind. 398, and *Sullivan v. Toledo, etc., R. W. Co.*, 58 Ind. 26.

The first was a case involving a claim for the destruction, by fire, of certain buildings, and the ordinary rule was applied in holding that the owner was required to allege that he was free from negligence contributing to the loss.

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The second was an action to recover for the negligent killing of a minor child, and it was held necessary to allege that the father, who sought to recover, was guilty of no negligence contributing to the death of the child. One's property and his minor children are subjects of his care and control, and, as in agencies, he is responsible for their conduct and entitled to their services. Not so with the wife; her husband is not, legally speaking, subject to her control and the right of action accruing to her or to his estate is that which he might maintain if living. If living and prosecuting the action for his own personal injuries, his contributory negligence alone, and not that of his wife, would defeat the action; that relationship does not exist between the husband and wife which imputes the negligence of one to the other; especially is this true where the one sues in the right of the other, as in this case.

The case of the *Indiana Mfg. Co. v. Millican, Admr.*, 87 Ind. 87, holds that in an action by an administrator it is not necessary to negative contributory negligence by the administrator. The fact that the widow administers is no reason for a distinction in the rule, and if the distinction could be maintained and the rule carried to its logical conclusion every complaint by an administrator would be required to negative the contributory negligence of each person interested in the recovery sought. The doctrine of imputed negligence in such cases was expressly repudiated in *Miller, Admr., v. Louisville, etc., R. W. Co.*, 128 Ind. 97; *Louisville, etc., R. W. Co., v. Creek, Admr.*, 130 Ind. 140.

As to the second objection to the complaint, the appellant admits that if the allegation so objected to had been omitted, the general allegations of freedom from contributory negligence would have made the complaint sufficient.

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We are aware of the rule that where the facts pleaded show contributory negligence, the general negative allegation will not be sufficient, but the facts here specially pleaded, while, if not entirely sufficient of themselves to show every precaution required of one crossing a railway, they do not preclude the existence of further facts, and do not purport to set forth in detail all that he did to discover the approach of a train. In other words, we do not understand that a specific allegation will control the general allegation where the specific allegation does not appear to include all of the occurrence and stand in conflict with that otherwise embraced in the general allegation. *Warbritton v. Demorett*, 129 Ind. 346.

But, aside from this, we can not agree with counsel that an allegation that the decedent "was unable to see or hear," is less than that he could not or did not see or hear. If he was unable to, he could not; if he was unable to, he did not.

We conclude that the complaint was sufficient against the objections urged.

The jury trying the cause returned a special verdict, and thereupon the appellant moved the court "to require the jury to retire to their jury room and make a finding in their verdict of how far the decedent could have seen a train approaching * * * when he was across the easterly side track and thirty-five feet distant from the main track."

The appellant now complains that the court erred in overruling this motion.

It is not the object of the special verdict that it shall return the weight of the evidence upon every question about which witnesses testify. The facts in issue under the pleadings are required, and not the abstract questions of evidence or evidentiary details. *Whitworth v. Ballard*, 56 Ind. 279.

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The jury did find that "when he had passed the west side of the defendant's car that stood in the said Center street as aforesaid, he looked north and saw the defendant's train approaching upon said main track from the north at a high rate of speed, to wit, at forty-five (45) to fifty (50) miles an hour, without sounding bell or whistle, when he instantly pulled vigorously upon his lines and endeavored to stop his horses that were, by that time, ten feet from defendant's main track, but that his team had, by this time, discovered the said approaching train, and become at once greatly frightened and unmanageable; that he exercised his utmost efforts to stop his team to keep them off defendant's track, but was unsuccessful; that finding he was unable to stop his team, he pulled vigorously upon his left line and struck his off horse and urged his team to turn to the left to escape a collision, but without success, and was struck by said moving engine and train and injured and killed."

If he used proper care up to the time he passed the car on the side track; if, when he had passed the standing car, he saw the train, and if, after seeing it, he did all that was possible to do to avoid collision, and we think this is the effect of the finding quoted, then the presence of a finding that the train was one hundred or one thousand feet from him when he first saw it would not be of controlling force against the conclusions of due care on the part of the deceased.

In the court's instruction numbered one, two forms of special verdict were submitted to the jury, with directions to take either or modify either, or write one for themselves to meet the facts as they might find them, and stated that they would "hardly be driven to this labor unless neither of the forms of verdict submitted * states the facts proved in the form you prefer to state them."

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This statement, it is insisted, was an intimation to the jury that they should adopt one form or the other.

We are unable to believe the language employed capable of the construction counsel give it. The instruction, when all of its parts are considered, was a plain direction that the jury could adopt either form or modify either form, or reject both and prepare a form to suit their finding, but that the labor of preparing a form would not be necessary if either form stated the facts as found. There is no complaint that this direction was not proper.

The second of the court's charges contained the following: "And if, on any material fact, the evidence is equal, so that there is no preponderance, you are not at liberty to find and state that fact in your special verdict."

Appellant insists that this was an error, and that where the evidence fails to preponderate in favor of an essential fact, the verdict should find expressly the non-existence of that fact. To this insistence is cited *Gulick v. Connely*, 42 Ind. 134.

We do not understand the rule to be as counsel state it, nor do we understand the case cited to have so held. The duty of the court or jury stating the facts specially is not to state the failure of one who assumes the burden of an issue, but the failure to state the existence of the fact is equivalent to finding the nonexistence of the fact. A fact not found is a finding that the fact is not proven by a preponderance of the evidence. *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, and cases there cited.

The court instructed the jury that the maximum recovery allowed to the appellee in the event the finding should be for her was ten thousand dollars. The appellant claims that the limit should have been stated at five thousand dollars.

By the act of March 29, 1879, Acts 1879, p. 173, R.

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S. 1881, sections 4020, 4021 and 4023, certain signals were required to be given by railway companies before running their trains over highway crossings, and a right of action was given for injuries sustained by reason of the failure to give such signals, and the amount of the recovery therefor was limited to five thousand dollars.

By the act of April 8, 1881, Acts 1881, p. 590, R. S. 1881, section 4020, the first section of the act of 1879 was amended so as to require the engine whistle to be sounded distinctly three times not less than eighty nor more than one hundred rods from any highway crossing, and to ring the engine bell continuously from the time of sounding such whistle until the engine should fully pass such crossing. As to the right of action so given by the act of 1879 and the limit in amount of damages so prescribed, the amending act made no change.

By the act of April 7th, 1881, Acts 1881, p. 241, section 8; R. S. 1881, section 284; R. S. 1894, section 285, it was provided that when the death of one is caused by the wrongful act or omission of another an action might be maintained therefor, and the limit in damages was provided at ten thousand dollars, such sum to inure to the exclusive benefit of the widow and children, or next of kin. The latter act does not expressly repeal the act of 1879, and it remains to be determined whether there is a repeal by implication as to the amount of recovery.

In Sutherland on Statutory Construction, section 145, it is said that "a new statute which affirmatively grants a larger jurisdiction or power, or right, repeals any prior statute by which a power, jurisdiction or right less ample or absolute had been granted."

This illustration is there cited from *Regina v. Llaugian*, 4 B. & S. 249: "An English statute authorized the removal of poor persons likely to become chargeable. The

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power was given to two justices, one to be of the *quorum*. A later statute recited that act and repealed the provision for removal on the probability of their becoming chargeable, and enacted that a removal might be made of such persons after they had become chargeable to the parish, by two justices of the peace, without mention of the *quorum*. It was held that the requirement that one of the justices be of the *quorum*, contained in the previous act, was repealed by implication."

An early case in this State, in circumstances and principle much like the question under review here, holds that "as a general rule it is not open to controversy, that where a new statute covers the whole subject-matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication; as the provisions of both can not stand together." *President, etc., v. Bradshaw*, 6 Ind. 146.

To the same effect are the *Madison, etc., R. R. Co. v. Bacon*, 6 Ind. 205; *Jeffersonville R. R. Co. v. Millet*, 8 Ind. 255; *Board, etc., v. Potts*, 10 Ind. 286; *Indianapolis, etc., R. R. Co. v. Davis*, 10 Ind. 398; *Evansville, etc., R. R. Co. v. Lowdermilk, Admr.*, 15 Ind. 120; *Hayes v. State*, 55 Ind. 99; *Dowdell v. State*, 58 Ind. 333; *Wagoner v. State*, 90 Ind. 504. See also *Norris v. Crocker*, 13 How. (U. S.) 429; *People, etc., v. Mayor of New York*, 32 Barb. 102 (121).

If the provisions of the act of 1879, extending the right and limiting the recovery, had been omitted therefrom, we apprehend that the act of April 7th, 1881, would have supplied that right and limited the recovery. It is evident, therefore, that the act of 1881 includes these elements of the act of 1879, and grants a larger right, not only in the increase of the amount of possible recovery, but in defining the persons to whom the recovery

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shall go. It is evident that the Legislature did not intend to continue the two provisions as to the amount of recovery, not only from the fact that the new act points out the persons who may recover, but because there could be no possible reason for limiting the recovery to five thousand dollars for wrongfully causing the death of one by a failure to give required signals, when ten thousand dollars could be recovered for negligence of any other character resulting in death. We conclude that the limiting clause of section 4 of said act of March 29th, 1879, is repealed.

The court gave the following instruction, to which exception is made: "The burden rests upon the plaintiff of proving the material facts averred in the complaint. Whether the facts are material, however, need not cause you trouble, as that is a question of law for the court. You find what facts have been proved, and in determining what have been proved, it will be necessary for you to consider what facts have been attempted to be proved, and by whom, that is, by which party. If the plaintiff asserts a fact, and offers evidence to prove it, and the defendant offers evidence to disprove it, you will then weigh all of the evidence on that point. If you find that the evidence of the plaintiff outweighs that of the defendant, you should find the facts proved, and it should become a part of your verdict. If the evidence of the defendant upon that point outweighs that of the plaintiff you will leave that fact out of your verdict. And it may arise that you will find the evidence equally balanced upon a fact asserted by the plaintiff, that is, you will find that after you have carefully considered all of the evidence upon such fact upon both sides you are unable to determine which side has the preponderance. In such case you should omit the fact asserted from your verdict. These remarks apply to the facts averred, and upon

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which proof was offered by the plaintiff; the same will apply to facts asserted by the defendant. After plaintiff has made proof of facts to entitle her to recover, her recovery may be defeated by other facts proved which avoid the effect of the facts so proved by the plaintiff. These facts are averred by the defendant, and constitute a part of the defense. The burden of proving such facts is upon the defendant by a fair preponderance of the evidence."

It is objected that the jury are told that the plaintiff must prove the material facts, and are not advised what are material facts, but are advised that what facts may be material need not trouble them since that was a question of law for the court. The plain direction of the court by this instruction is that all facts asserted by the plaintiff, if proven, should be returned by the verdict, and those facts so asserted and not proven should be omitted. This was correct since the jury were to return a special verdict, and the facts asserted by the plaintiff and not returned would be considered by the court as not proven, and those returned would be by the court weighed in the light of their materiality, and if found to cover all of the issues necessary to a recovery, and not overthrown by facts found in behalf of the defendant would, as a matter of law, authorize judgment for the plaintiff. There is no place for the criticism that in the event the evidence of the plaintiff's witnesses established a fact asserted by the plaintiff, adversely to the plaintiff, it would be the duty of the jury, under this instruction, to so return. The fact asserted by the plaintiff, and not proven, was directed to be omitted. In the event supposed, the fact would necessarily be omitted, and if essential to a recovery would defeat the action.

Another instruction was in submitting the forms of special verdict as prepared by the parties respectively.

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One expression to which exception is taken is, "you must not forget that you are not required to find any fact to be proved, because you find the same suggested in a verdict, or in the verdict of the party you desire to favor." It is said that the suggestion that it was possible for the jury to entertain a desire to favor a party gave them a wrong impression of their duties.

In the absence of evidence, there is no permission to the jury to extend favors to the litigants. In other charges given, however, the burden of proof was clearly defined and the jury impressed that this burden should be discharged before a fact could be found in favor of the party asserting it. The phrase "the party you desire to favor" was so manifestly employed in the sense of "the party with whom you find the merits," that the jury were not given to understand that their verdict could be bestowed by favor. If the expression were palpably employed as appellant contends, it would be difficult to determine that the appellant was harmed by it.

This further sentence in the instruction is criticised: "If you do not consider that one of the forms submitted to you speaks the truth, as you understand it, you can not adopt it as your verdict."

It is said that this was erroneous, since the verdict was not to be found upon what the jury understood, but upon the facts to be found by a preponderance of the evidence.

Verdicts are necessarily rendered, when properly rendered, upon the understanding of the jury, and the basis of that understanding is the truth of the facts as they find such facts established by a preponderance of the evidence. No valid objection can be urged, we believe, against this instruction.

It is insisted, in support of the sixth and seventh

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causes for a new trial, that the verdict is not sustained by the evidence in so far as it is found that the deceased exercised due care and did not contribute to the collision by his own negligence.

The collision occurred at the crossing of Center street, running east and west, and the main track of the railway running north and south. East of the main track, at the crossing, are two side tracks, the distance between the inner rails of the outer tracks being 34 feet and nine inches. The deceased was approaching the crossing from the east, driving slowly a span of gentle horses to a light top buggy without side curtains; on his right, or the north side of Center street, and extending up to within four feet of the first side track and standing immediately north of the street, was a warehouse, and before reaching the warehouse, for more than one square, no view could be had of a train approaching the crossing from the north; at the crossing, the street is sixty feet wide, and at the crossing of the street and the first side track, the street was obstructed by a box car standing more than half its length into the street and extending near the used portion of the crossing. So driving, the deceased reached a point where his horses passed the end of the box car, when he checked them, leaned forward to get a view to the north, unobstructed by the car, and although he looked and listened he could neither see nor hear the approaching train, though he could, from that point, see but about one hundred feet up the main track. He then started forward, and when he had passed the car he looked north and saw the train approaching at the rate of 45 or 50 miles an hour. He instantly pulled vigorously upon the lines, endeavoring to stop the horses, which had then come within ten feet of the main track; the team became frightened and he could not stop them, and immediately, upon observing this, and acting with

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all haste and great strength, he pulled upon the left line and struck the horse nearest the main track, in an effort to guide the team south and away from the track, and at this instant the locomotive crashed upon him. While approaching the crossing, and in his efforts to see and hear and avoid collision with appellant's train, the deceased was in possession of all of his faculties.

Not attempting to weigh the evidence, but viewing that most favorable to the appellee, the conduct of the decedent in that moment of peril was as we have stated. Many general principles and numerous authorities are cited by appellant's able and diligent counsel to support the claim that the decedent was not free from negligence.

These principles and authorities require no more than that the decedent should have exercised prudence and caution in proportion to the dangers incident to the crossing with its obstructions and peculiar hazards.

Perhaps a better statement of the rule is that of appellant's counsel: "The care to be exercised by him should have been commensurate with the danger to be encountered."

The measure of care is not that the traveler shall secure absolute freedom from the dangers which flow from the negligence of railway operatives. If such were the requirement, an utter abandonment of care could prevail on the one side, with a high degree of care on the other, and with no remedy for injuries. It is certainly sufficient, for the ends of justice, that, when the company has been negligent, the traveler has done all that he reasonably could to avoid collision, and that it has been all that prudence and reasonable caution would suggest under the circumstances, and consistent with his right to use the highway crossing.

Among the few things suggested by the appellant as necessary for the decedent to have done, and which it is

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claimed that he did not do, it is said: "When he had passed the obstruction and could see the train approaching, he should have stopped his team instantly, or turned them out of the way of danger."

It must be remembered that, as found by the jury, at the time he had passed the box car, he looked and saw the train coming at the rate of 45 or 50 miles an hour, and when he had made an unsuccessful effort to stop his team, it then being within ten feet of the main track, he made a faithful and diligent effort to do the very thing suggested, but failed. Is it wonderful that a vigorous effort to stop the team should have failed? Hardly, when we consider that horses are not as subject to command and as free from excitement in a perilous situation as are experienced persons, and when we remember that they could have been placed in no situation more certain to frighten them and render them uncontrollable.

Appellant urges that the decedent having gotten his team so near the track that they became frightened and unmanageable is contributory negligence, and the fright of the team should not be deemed a circumstance excusing the avoidance of injury.

The following from *Rhoades, Admx., v. Chicago, etc., R. W., Co.*, 58 Mich. 263, is quoted: "If a person approaching a railroad crossing *without reasonable caution and care*, particularly, where a fast train is due and approaching, and by reason thereof his team becomes unmanageable, goes upon the track and injury results, there is such contributory negligence as will prevent a recovery."

This may be true, "without reasonable caution and care," but not in the presence of "caution and care." *Terre Haute, etc., R. R. Co. v. Brunner*, 128 Ind. 542.

And it is said that when he discovered the approaching train he should have turned his team to the north

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between the two side tracks, where there was a wagon way. A choice of the direction in which to turn from the danger could not be made with the cool deliberation of one in no peril and not balked by the natural instincts of the animals to fly from the approaching danger, instead of turning towards it. To have turned the team towards the north would have required the overcoming of the fright from which the horses were suffering and to have induced them to face the train and remain within a few feet of it while it passed. The effort to do so would have been a probable failure, but, in considering what Burton was required to do under the circumstances, it should not be overlooked that the time in which to make a choice was not that which permitted deliberation, the train was coming at the rate of 500 feet each seven seconds, or more than 70 feet in a second, and its coming imperiled life. Under the circumstances, and looking at the situation without fear and with time for reflection, we have no doubt that his choice to drive the team down the track was better than to have adopted the course suggested for him by the appellant.

It is further insisted that the evidence does not support the finding that the decedent listened, or that he did not hear the train. We find evidence of his conduct when he halted at the end of the box car, leaned forward and looked towards the north; his actions were described to the jury, and while the illustrations of the witnesses are not given in the record, it does appear that they gave illustrations. The manner of inclining the head, the fact that he looked, the time and manner of going forward after looking, are all circumstances from which the jury might reasonably have determined that he listened. The fact that some persons more favorably situated than the deceased heard the train, and that others did not hear it, and considering the obstruction of the view

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and the hearing by the box car, and the fact that the decedent pressed forward after looking and listening, are all circumstances from which the jury were required to determine whether he heard or did not hear the approaching train. We are certainly unable to say that the weight of the evidence was not as found by the jury.

It is urged that the finding of negligence on the part of the appellant, and the assumption that any act or omission of the appellant caused the collision, are not supported by the evidence.

One finding of negligence returned by the jury in their special verdict, is as follows:

"10. We further find that upon said 4th day of October, 1890, as defendant's train number twenty (20) aforesaid approached said Center street crossing in said town of Royal Center, defendant omitted, neglected and failed, when said train was not less than eighty (80) rods and not more than one hundred (100) rods from said Center street crossing, to sound the whistle attached to the locomotive engine of said train, or any whistle, three times distinctly, and then and there omitted, neglected and failed to ring the bell attached to said engine, or any bell, continuously from the time when said train came within eighty (80) rods of said crossing until said engine had passed said crossing, and omitted, neglected and failed to sound any whistle or ring any bell after the said train came within eighty (80) rods of said crossing until so near it that it was then and there too late for said Thomas S. Burton to see and hear said train and escape collision with it; that defendant's whistle upon said engine was sounded by giving one long blast for the station at Royal Center when between the Chicago and Runkle crossing as it approached said Center street crossing, a distance from said Center street of about 2,500 feet."

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As to whether the bell was rung, the appellant expressly concedes that there was conflict in the evidence, so that we may presume that the jury held that conflict most favorable to the appellee. There was evidence from which the jury might have found that the whistle was not sounded for the crossing where the collision occurred, and that the only sounding of the whistle within two miles of that crossing was one blast near a quarter of a mile north of Runkle crossing, which crossing was 1,800 feet north of Center street crossing.

This neglect of a duty expressly enjoined by statute, if the injury can be attributed to it, is sufficient to charge the appellant with the consequences. R. S. 1881, sections 4020, 4021, *supra*; *Terre Haute, etc., R. R. Co. v. Bruner, supra*; *Baltimore, etc., R. R. Co. v. Walborn, Admr., 127 Ind. 142*; *Cincinnati, etc., R. R. Co. v. Butler, 103 Ind. 31*; *Chicago, etc., R. R. Co. v. Boggs, 101 Ind. 522*; *Cincinnati, etc., R. W. Co. v. Hiltzhauer, 99 Ind. 486*; *Indianapolis, etc., R. R. Co. v. McLin, 82 Ind. 435*; *Pittsburgh, etc., R. W. Co. v. Martin, 82 Ind. 476*; *Chicago, etc., R. R. Co. v. Fenn, 3 Ind. App. 250*.

In the absence of the statute requiring that the engineer shall, "when such engine is not less than eighty nor more than one hundred rods from such crossing, sound the whistle on such engine distinctly three times, and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing," it would be the duty of the railway company to give reasonable and timely warning of the approach of its trains to highways.

This statute expresses the legislative definition of the character and extent of warning which shall be required, and less than the warning required is not deemed reasonable, and constitutes negligence. The duty enjoined

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is for the benefit of persons entitled to use the crossings, and was designed to give such timely notice of the approach of trains as would enable such persons to avoid the dangers of the crossing. Crossings are dangerous, but the public and the railways have the right to use them, and to save human life it has been provided that one blast of the engine whistle is not enough, nor are two sufficient, but there shall be three, and the bell shall be rung continuously for eighty rods. This is necessary that if the traveler is occupied, and does not hear the first or the second he may hear the third, or if his conveyance makes such noises that he does not catch the first sound he may have further opportunity, and if he happens to lose all the whistle blasts he may have an opportunity, while the train is running eighty rods, to hear the bell. But appellant insists that the decedent could have heard the sound of the whistle given at the approach to Runkle crossing, and indulges the presumption that he did hear it, concluding, therefore, that further sounding of the whistle or ringing of the bell was unnecessary. The weakness of this position is in the fact that there is no evidence that he did hear the sounding above Runkle crossing, and the jury find that he did not hear it.

It is said that though negligent in failing to give the signals it does not appear that the collision is attributable to that negligence.

In *Chicago, etc., R. R. Co. v. Boggs, supra*, this court quoted with approval from *Pierce on Railways*, 350: "The omission is calculated to mislead the traveler, and to assure him that the coming of the train is not imminent."

It was there further quoted from *Pittsburgh, etc., R. W. Co. v. Martin, supra*, as follows: "The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods of

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the crossing; he was misled by the defendant's negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing toward the crossing within a distance of eighty rods."

In *Terre Haute, etc., R. R. Co. v. Brunker, supra*, it was said that the failure to give the required signals was an inducement to the traveler to approach within an unsafe proximity to the crossing. The care exercised by the decedent to learn of the approach of the train, and the effort made by him to avoid the collision after he discovered its approach, are controlling circumstances in reaching the conclusion that if he knew of its approach he would not have gone upon the track. Having once reached the conclusion that he exercised diligence; that the appellant was negligent, and that but for such negligence the collision would probably not have occurred, it follows, as a necessary consequence, that the negligence was the cause of the collision. In the view taken of the case, it is not necessary to consider the effect of the alleged leaving of the box car across the street as an element of negligence combining to establish appellee's cause of action, nor need we determine whether the high rate of speed was negligent under the circumstances, nor do we examine the question as to whether it was the duty of the appellant to have maintained a flagman at the crossing.

Complaint is made that the assessment of damages in the sum of \$9,400 was excessive. The true measure of recovery is the pecuniary loss of those entitled to recover. The loss to his child of the father's care and training is one element of this measure of damages. *Board, etc., v. Legg, Admr.*, 93 Ind. 523. The loss to the wife of a means of support in the service and as-

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sistance of her husband is one element of the measure of damages. *Board, etc., v. Legg, Admr., supra; Korrady, Admr., v. Lake Shore, etc., R. W. Co.*, 131 Ind. 261. As tending to establish the extent of these losses, it is proper to consider the probable future earnings of the husband and father, and his age, health, strength, occupation, habits, opportunities and capability are elements of this consideration. *Ohio, etc., R. W. Co. v. Voight, Admr.*, 122 Ind. 288; *Hudson v. Houser, Admr.*, 123 Ind. 309; *Lake Erie, etc., R. R. Co. v. Mugg, Admr.*, 132 Ind. 168; *Louisville, etc., R. R. Co. v. Wright, Admr.*, 134 Ind. 509. These cases recognize the rule that the gross earnings should be subject to deduction on account of the reasonable cost of his own support, and that the present payment of the sum awarded in damages is a proper circumstance in determining the amount which shall be allowed as the equivalent of the earning capacity of the deceased.

But it is said that "where the relation of the party, whose death has been caused, to those for whose benefit the suit is being prosecuted, has been shown, and his obligation, disposition, and ability to earn wages or conduct business, and care for, support, advise, and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of the jury." *Louisville, etc., R. W. Co. v. Buck, Admr.*, 116 Ind. 566; *City of Wabash v. Carver*, 129 Ind. 552. The ultimate question of the amount resting within the province and sound discretion of the jury, their finding will never be disturbed where the court can not say that improper motives have swayed them in ascertaining the amount returned. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261; *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481; *City of Wabash v. Carver, supra*.

Burton's expectancy was thirty-eight and one-tenth

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years; he was in good health and sound constitution, temperate, industrious and frugal; he was a farmer who could earn, as some of the witnesses stated, on a rented farm, fifty dollars per month. His personal expenses were not estimated. It will be seen that during his expectancy his probable earnings would have aggregated a large sum. The value of his services to his wife and his infant child until it attained its majority of a personal character, and independent of those things purchaseable from his earnings are not estimated in the evidence nor by counsel, and the appellant, we infer, would exclude any estimate by the jury of that element of damage. We do not think it should be excluded. These the jury, in the range of the discretion given them under the law, and the evidence, and applying the results of their common observation and daily experience may estimate and add to the sum shown to be the net earning capacity of the decedent, after deducting his personal expenses, as they may be estimated, and considering the value of the present payment of the sum to be awarded.

We can not say, in view of the rules suggested and the facts stated, that the jury abused their discretion in assessing the sum found, though we might not have awarded so large a sum.

Objection is made that the special verdict finds a conclusion and not a fact in the finding that Burton was killed "by and because of the negligence and carelessness of the defendant, and wholly without any fault or negligence" on his part.

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In the tenth finding of the jury, above quoted, the facts are found, which, as we have already shown, establish the negligence *per se* of the appellant.

In the ninth, eleventh, twelfth, and fourteenth findings of the jury the character of the crossing, and the obstructions to the view and from the sounds of an approaching train, the speed of the train and the conduct of the decedent, are all given in detail and are sufficient, as we have stated them and have already held, to establish the due care of the decedent in attempting to cross the tracks.

If we should hold that the finding objected to is a conclusion and not a fact, it would be our duty to disregard that finding, and if we should disregard it, enough is found to establish both the negligence of the appellant, causing the death, and the absence of negligence on the part of Burton contributing, and the finding of a conclusion would not vitiate the verdict. *Terre Haute, etc., R. R. Co. v. Brunker, supra.*

There are other questions suggested in the appellant's brief, which have already received our consideration or are not so argued as to advise the court of any substantial objection to the proceeding of the lower court.

Finding no available error in the record, the judgment of the circuit court is affirmed.

Filed April 17, 1894.

ON PETITION FOR A REHEARING.

HACKNEY, C. J.—Again the appellant urges the proposition that Burton was guilty of contributory negligence upon the facts found by the jury. A decision of the question presented depends upon the construction of the finding rather than upon any differences between counsel and the court as to the law of contributory negligence. The finding is that from which we quoted first in the

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original opinion. It was found that the view and the hearing of an approaching train was cut off from Burton for 375 feet before reaching the railway tracks; that he proceeded slowly until his horses passed the end of the box car, when he checked them, leaned forward to get a view to the north, unobstructed by the car, and, not seeing or hearing the approaching train, and being unable to see more than one hundred feet up the main track, he started forward "and when he had passed the west side of the car * * he looked north and saw the * train approaching * * at forty-five to fifty miles an hour * * * when he instantly pulled vigorously upon his lines and endeavored to stop his horses that were by that time ten feet from defendant's main track, but that his team had by this time discovered the said approaching train and become greatly frightened and unmanageable;" then followed his efforts to keep the team from the main track. In this connection we restate the facts found, that the box car stood 34 feet and 9 inches from the main track.

Counsel for the appellant endeavor to maintain that, under the facts stated, Burton proceeded 11 feet and 9 inches from the car before again looking north, allowing 10 feet from the horses to the main track and 13 feet from the team and vehicle back to Burton. So construing the facts, it is claimed that it was negligence to proceed 11 feet and 9 inches in plain view of the train without looking to see if it was approaching. With this construction of the facts, we did not and do not now agree. The language of the finding is not that "*when he had passed the car and his horses had gone to within ten feet of the main track he looked and then pulled upon his lines.*" The sense of the language of the finding is that "*as soon as*" he had passed he looked, or, "*just after the moment*" of passing he looked, or, he passed the car, "*at which time*" he looked. The quoted words are definitions of

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the word "when" as given by the Century Dictionary and sustained by Webster's International Dictionary, edition 1893.

When he had passed the car and had looked, and, when he had pulled upon the lines and endeavored to stop the horses, it was then that the horses were "ten feet from defendant's main track." If we are correct in this construction of the finding, it showed diligence and not contributory negligence on the part of Burton.

The petition is overruled.

Filed Nov. 16, 1894.

No. 16,882.

JONES ET AL. v. CASLER.

WILL.—Destruction of.—Establishment and Probate.—Complaint.—A complaint to establish and probate a will alleged to have been executed by the testatrix, and fraudulently destroyed after her death, sufficiently shows the existence of the will at the death of the testatrix.

SAME.—When Only Substance of Will Need be Pleading and Proved.—Evidence.—A complaint to establish and probate a lost or destroyed will is not required to set out the exact words, but it will be sufficient where no copy has been preserved if the substance of the will be pleaded, showing the disposition made of the property, and it will also be sufficient if the proof follow the pleading and be made as required by statute.

SAME.—Allegation as to Residence of Testator.—A complaint to establish and probate a will alleged to have been fraudulently destroyed by the defendant is not bad for failing to allege the county and State wherein the testatrix died.

SAME.—Proof of Part of Will Fraudulently Destroyed.—If part of the provisions of a will are proved according to law such part will be given effect as against the fraudulent destroyer of the will.

PLEADING.—Complaint.—Administrator.—Party to Record.—Final Judgment.—Appeal.—Where an administrator is made a party to an action upon application of the plaintiff, and his name appears in the

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146	319
139	382
152	559
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156	287
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list of defendants given in the title of the action, he is a party to the record, although there is no allegation in the complaint that he is administrator or in any manner connecting him with the cause of action, and if the judgment rendered is broad enough to preclude all the parties, he is entitled to appeal; and as the verdict could not cure a defect consisting in the omission of facts essential to a cause of action, the complaint as to him will be held to be insufficient.

SPECIAL VERDICT.—Omission of Essential Facts.—Venire De Novo.—Omitted essential facts do not vitiate a special verdict and a motion for a *venire de novo* will not lie therefor.

SAME.—Improper Findings Disregarded.—Improper findings, such as conclusions, opinions or evidentiary facts in a special verdict will be disregarded, and a motion for a *venire de novo* on account thereof will not be granted.

SAME.—Finding of Fact.—Presumption as to Evidence.—Where a jury, in a special verdict, finds a fact to exist which the law requires to be proved by a certain number of witnesses, it is not necessary that the finding should state that such fact is proved by that number of witnesses, as it will be presumed that the finding that the fact exists is based upon the requisite proof.

BILL OF EXCEPTIONS.—Time for.—Motion for New Trial.—Where, on June 8, 1892, a motion for a new trial was filed and taken under advisement, and at the same time the court allowed of record one hundred and sixty days for the filing of a bill of exceptions, and on February 27, 1893, the motion for a new trial was overruled and the bill of exceptions filed, such bill is, under section 626, R. S. 1881, properly in the record.

EVIDENCE.—Document.—Fraudulent Destruction.—Search.—Where the theory of a case is that a document was fraudulently destroyed, proof of a search and failure to find the document is not required.

INSTRUCTION TO JURY.—Invasion of Jury's Province.—An instruction that "when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior; and, also, to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or a want of recollection," is bad as invading the province of the jury.

From the Wells Circuit Court.

L. Mock and *A. Simmons*, for appellants.

E. R. Wilson, *J. J. Todd*, *F. M. McFadden* and *W. H. Eichhorn*, for appellee.

Jones et al. v. Casler.

HACKNEY, C. J.—This was a suit by the appellee to establish and probate the last will of Clarissa E. Jones.

By the first paragraph of the complaint, it was alleged that said Clarissa died testate, leaving certain real estate; that she left her husband, Jacob Jones, and one child, Anna, surviving her; “that after the death of the said Clarissa Jones, her husband, Jacob Jones, with the fraudulent intent of cheating and defrauding this plaintiff, knowingly and fraudulently, and without the plaintiff’s consent, burned and destroyed” the last will of said Clarissa, which had, in the lifetime of said Clarissa, been made, signed, and published in the presence of three named persons who signed said will as attesting witnesses.

It is alleged, generally, that the testator, by said will, devised said lands to said Jacob Jones for and during his natural life, and that “said will further provided that after the death of said Jacob Jones, said Clarissa gave and devised said real estate to the plaintiff, Herbert B. Casler, in fee, provided that she, the said Clarissa, should not have a child living at the time of the death of said Jacob Jones.”

And said will further provided that if she, the said Clarissa, should have a child, and the child lived, and was living at the time of the death of said Jacob Jones, the real estate was to be divided equally between said child and Herbert B. Casler.

It is also alleged that by reason of the destruction of the will, the substance thereof only can be given, which, he alleges, is stated as above.

Appellants object to the sufficiency of this paragraph as not alleging that the will was in existence at the time of the death of said Clarissa, and that all of the provisions of the will are not pleaded with clearness and cer-

tainty, but that the allegations as to its provisions are conclusions, and not statements of fact.

The allegations of the execution of the will, the intestacy of the testatrix, and the destruction of the will after her death, sufficiently showed the existence of the will at the death of the testatrix. The allegations of the contents of the will are general, and, under ordinary circumstances, would be insufficient; but the facts alleged, if proven as alleged, would certainly authorize the establishment of the will so far as its bequests are concerned. To require that a copy of the will or the language of the bequests, in detail, should be pleaded, where no copy has been preserved and where the memory of witnesses does not hold the exact words, would not only deny the substance for mere form, but would offer a premium upon the rascality of one whose interests might suggest the destruction of the will.

As said in *Anderson v. Irwin*, 101 Ill. 411: "The instrument in controversy having been destroyed without the fault of the defendant in error, * * * and there not appearing to be any copy of it in existence, it would be equivalent to denying the complainant relief altogether to require her to prove the very terms in which it was conceived. All that could reasonably be required of her under such circumstances, would be to show in general terms the disposition which the testator made of his property by the instrument,—that it purported to be his will, and was duly attested by the requisite number of witnesses."

In *Allison v. Allison*, 7 Dana (Ky.), 91, it was said, in speaking of the character and extent of proof required in such a case: "Nor is there any just ground to object to the proof, because the witnesses have not given the language of the will, or the substance thereof. They

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have given the substance of the different devises, as to the property or interest devised, and to whom devised. And we would not stop, in the case of a destroyed will, to scan with rigid scrutiny the form of the proof, provided we are satisfied of the substance of its provisions."

In *Early v. Early*, 5 Redf. (N. Y.) 376, is the following language applicable to this question and to section 2609, R. S. 1881, cited by appellants' counsel: "Section 1865 of the code requires that the provisions of a lost will must be clearly and distinctly proved by at least two credible witnesses, before it can be admitted to probate; but this section must receive a liberal construction (*Hook v. Pratt*, 8 Hun, 102 (109)); and its spirit is complied with by holding that it applies only to those provisions which affect the disposition of the testator's property, and which are of the substance of the will."

In our opinion, the first paragraph of complaint was not subject to demurrer for want of sufficient facts in the respects urged by the appellants.

The second paragraph of complaint differs from the first in containing what is alleged to be the substance of the entire will which is embodied in the pleading in the form in which it was drafted.

The objections urged to the first paragraph are urged also to the second, and for the reasons above stated must fail. In addition to the objections there urged, it is further claimed that the second paragraph was insufficient in failing to allege the county and State wherein Clariessa E. Jones died. To this proposition is cited section 2580, R. S. 1881. Under that provision of the statute, if the testatrix owned, at her death, the lands devised, and which were alleged to be situated in Wells county, Indiana, the place of her residence or of her death, was immaterial, since the location of assets deter-

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mines the county in which proof of wills may be taken. However, this proceeding comprehends more than the probating of the will, its primary object is to establish the will. The *gravamen* of the complaint, upon this branch, is the fraud of Jacob Jones in destroying the will. This question is one peculiarly within the equitable jurisdiction of the courts, and does not arise upon, but is simply recognized by the statute, and some rules of procedure are laid down. *Hall v. Gilbert*, 31 Wis. 691. Under our code, which strikes down the distinctions, in practice, between actions at law and suits in equity, remedies invoking both jurisdictions may be combined in one proceeding, and the complaint is not demurrable if it pleads a right within either jurisdiction. It will be seen, therefore, that the complaint is not subject to demurrer if appellant's position were correct upon the proposition that probate of a will is not allowed without the allegations mentioned, since it is not objectionable as invoking the equitable jurisdiction of the court.

On behalf of the appellant Benjamin F. Starr, administrator of the estate of said Jacob Jones, deceased, it is assigned as error, and argued that the complaint did not state facts sufficient to constitute a cause of action. The record discloses that upon application of the appellee the said Starr, as such administrator, was made a party to the action, and was brought into court to answer the complaint; however, there was no allegation in the complaint that he was such administrator, or in any manner connecting him with the cause of action, though his name appears in the list of defendants given in the title of the action at the heading of the first paragraph of complaint.

The appellee now insists that Starr, as administrator, was not a proper or necessary party to the action, and

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that no judgment or decree was rendered against him from which this appeal may be prosecuted. The decree simply found the execution and destruction of the will, its provisions, and the death of the testatrix, of her daughter Anna, and of said Jacob Jones, and decreed that said will be established and admitted as probated. The general character of the decree is probably broad enough to preclude all persons who were parties to the record, and that Starr was not a party to the record is not asserted. There was, therefore, a final judgment from which his appeal lies. Was the complaint sufficient, as to Starr, after verdict? Verdicts do not cure defects which consist in the entire omission of facts essential to a cause of action. We can not escape the conclusion that each paragraph of complaint was insufficient as to the appellant Starr, administrator.

Upon the return of a special verdict by the jury, the appellants filed their motion for a *venire de novo*, which motion was overruled, and that ruling is here urged as error. One of the propositions urged is that the verdict had no finding as to whether the provisions of the will had been proven by two witnesses. Omitted essential facts do not vitiate a special verdict, and motion for a *venire de novo* will not lie therefor. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Board, etc., v. Pearson*, 120 Ind. 426; *Branson v. Studabaker*, 133 Ind. 147; *Equitable, etc., Ins. Co. v. Stout*, 135 Ind. 444.

It is further urged upon that ruling, that the special verdict contained conclusions. That some of the findings may be mere conclusions, opinions, or evidentiary facts or circumstances does not admit the motion for a *venire de novo*, but such improper findings are disregarded. See cases last above cited, together with the following cases cited by the appellants: *Conner v. Citizens St. R. W. Co.*,

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105 Ind. 62; *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210.

The office of the motion is to secure another trial because of the insufficiency of the verdict, general or special, to support a judgment in favor of either party. We apprehend that the instances are few where the motion may be properly addressed to a special verdict since, by the practice in this State, conclusions, opinions, evidentiary facts and the like are disregarded, and the facts properly found are alone regarded, and if an essential fact is not found it is treated as not proven. It is probably true that the motion will lie where the findings are so uncertain or ambiguous or contradictory that it can not be determined what was intended to be found upon a material fact or issue, but such an instance is not presented by the record in this case.

The appellants moved, also, for judgment in their favor upon the special verdict, which motion the court overruled, and of that ruling complaint is here made. Two propositions are urged against that ruling: That the verdict failed to find that the provisions of the alleged destroyed will had been proven by the testimony of two witnesses, and that the findings returned are mere conclusions of the contents of the will, and not the will in form, with signatures of the testatrix and attesting witnesses. Upon these propositions appellants cite section 2609, R. S. 1881, which is as follows: "No will of any testator shall be allowed to be proven and established as lost or destroyed, unless the same shall be proven to have been in existence at the time of the death of the testator; or be shown to have been destroyed in the lifetime of the testator without his consent, or otherwise fraudulently disposed of; nor unless the provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness."

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From what we have said as to the character of a proceeding to establish a will lost or destroyed, it is probable that a trial by jury and special verdict were never contemplated. See also *Wright, Admx., v. Fultz*, 138 Ind. 594. However it may be as to the right of trial by jury in a case like the present, we are unable to observe the necessity for a special finding that proof has or has not been made by the number of witnesses required by the statute. It is the law that a material fact in any cause shall be established by a preponderance of the evidence, and yet it could hardly be said that the jury should return specially their finding that such fact is supported by such weight of evidence. That question, upon the instruction of the court, is submitted to the consciences of the jurors, and when the facts are returned they are presumed to have been found from the requisite evidence. So in the case before us, and if that presumption is discovered to have been erroneously indulged, the discovery must be made upon the motion for a new trial.

The second proposition upon the motion for judgment in favor of the appellants rests upon findings of the substance of provisions of the will rather than the exact words and form of the will. We have said, upon the demurrer to the complaint, that the substance is sufficient where the exact words can not be established and more certainty in findings can not be required than is required in pleading or in evidence.

As Thornton says, in his treatise on the law of Lost Wills, p. 147: "Swinburn lays it down that the two witnesses need only testify 'to the tenor of the will.' 2 Swinburn, p. 14, pl. 4. By the 'tenor' of a will is meant 'its purport and effect, as opposed to the exact words of it.' Rapalje & Lawrence's Law Dic., 'Tenor.' So, in the present day, it is enough to prove the substance of the

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will, without proving the precise statement of the language or terms used in it. *Allison v. Allison*, *supra*; *Davis v. Davis*, 2 Adams, 223; *McNally v. Brown*, 5 Redf. 372; *Morris v. Swaney*, 7 Heisk. 591; *Wyckoff v. Wyckoff*, 1 C. E. Green, 401. But the substance, when proved, must show 'substantially the testamentary intentions of the testator.' *Woodard v. Goulstone*, 11 App. Cas. 469."

In the absence of authority, we should not doubt the rules thus stated. They are essential to the discovery and effectuation of devises which fraud and deceit would conceal or destroy. If it were otherwise, one whose condition would be improved by the destruction of a will could throw it in the fire and defy exact proof, which could rarely, if ever, be made. We would not be understood as departing in the slightest from the requirement that the provisions of the will shall be clearly proven, but we do not incline to the rule contended for by counsel for appellant, that such strictness shall be required as would practically defeat the ends of justice and promote the evil intended to be remedied.

Numerous questions are presented in argument upon the overruling of appellants' motion for a new trial, and, before taking them up, we will dispose of an objection by the appellee to a consideration of that ruling upon the ground that the evidence is not properly in the record. On the 8th day of June, 1892, the motion for a new trial was filed and taken under advisement by the court, and, at the same time, the court allowed of record one hundred and sixty days in which to prepare and file bills of exceptions. On the 27th day of February, 1893, the court overruled the motion for a new trial, and among other proceedings of that day the appellants filed their bill of exceptions embodying the evidence. It is now insisted that the time for filing the bill, as allowed by

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the court, having expired, the bill was not properly filed.

We have the following provision in section 638, R. S. 1894, section 626, R. S. 1881: "The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of court. * * * *Provided*, That if a motion for a new trial shall be filed in a cause in which such decision, so excepted to, is assigned as a reason for a new trial, such motion shall carry such decision and exception forward to the time of ruling on such motion."

The allowance of time by the court did not, and could not, operate to deny the right expressly given by the statute.

In discussing the sufficiency of the evidence to sustain the verdict, it is insisted that under section 2609, R. S. 1881, above quoted, some two witnesses must concur in their evidence of the entire contents of the alleged destroyed will, so that the instrument can be reproduced in writing and be written at full length upon the records of probate.

While conceding that courts of respectable authority have so held, we have already indicated our conclusion that proof of the substance of the provisions of the will is all that can reasonably be required, and as to the word provisions, employed in our statute, we do not understand that it was intended to comprehend all of the terms of the will, including the appointment of executors, the revocation of former wills and the like, but, that it was intended to include only those provisions which conferred some property right upon devisees or legatees. See *Wallis v. Wallis*, 114 Mass. 510; *Sheridan v. Houghton*, 6 Abb. N. C. 234; *Vining v. Hall*, 40 Miss. 83. So much of the will would enable the court to judge

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not only of the testamentary intentions of the testator, but to give the will its proper legal construction. No more could be reasonably required.

There are cases which hold that if the devises are proven only in part those which are proven satisfactorily may be probated. *Dickey v. Malechi*, 6 Mo. 177; 34 Am. Dec. 130; *Burge v. Hamilton*, 72 Ga. 568; *Skeggs v. Horton*, 82 Ala. 352; *Dower v. Seeds*, 28 W. Va. 112. It is not essential to our conclusion, that we should adopt this rule in its application to both lost and fraudulently destroyed wills, but it can not be objected by a spoliator, who has destroyed the evidence of provisions which may benefit him, that the provisions which have been proven according to law shall not be effective, and this should be especially true where it does not appear that provisions not so fully established would probably modify those provisions which are fully established.

That there was a will executed July 17, 1888, there can be no possible doubt; that Jacob Jones caused a will to be burned, after his wife died, the jury were fully authorized to find from the evidence; that it was the will so executed, was supported by evidence, both positive and circumstantial; that the will devised a life estate to Jacob Jones is proven by at least three witnesses whose evidence varies only in the expression of that interest; that the fee was devised to the appellee was the reasonable inference from, and construction of, the evidence of three witnesses. It is true that the evidence of the three witnesses does not concur as to the conditions upon which the appellee was to take the fee in the whole of the lands, one stating that the will gave Jacob Jones the option of taking the land and giving to the appellee twelve hundred dollars, a provision not remembered by any other witness. Two of the witnesses agree that the will gave the fee to the appellee upon the condition that the testa-

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trix had no child which should survive Jacob Jones. There was some difference in the remembrance of the witnesses as to an additional provision of one hundred dollars for the appellee, and as to whether, in addition to the fee, the appellee was to have, with Jacob Jones, a life estate in the land. Two of the witnesses agree that in the event of a child of the testatrix surviving her husband, that child was to share equally the fee with the appellee. In considering the evidence as we have stated it, we have selected such parts of the evidence of the various witnesses as was found most favorable to the conclusions we have stated. This we understand to have been the privilege of the jury, and we are not at liberty to set up the trivial inconsistencies in the evidence of any one witness as neutralizing that which supports the verdict. We may say, therefore, that the provisions of the will as alleged in the complaint, and as returned by the jury had the united support of two witnesses whose credibility was passed upon by the jury, and is not in review in this court.

The argument is made that the evidence does not prove a search and failure to find the will, and that if it had, the legal presumption must arise that the will was destroyed by the testatrix *animo revocandi*. The theory of the case was not that the will was lost, but that it was destroyed after the death of the testatrix; search, therefore, was not consistent with that theory, and the burden was assumed by the appellee and discharged by the evidence, that the will was destroyed, not by the testatrix with the intention to revoke it, but by another.

Complaint is made that the court charged the jury that if they found any fact established by a preponderance of the evidence they should state such fact in the special verdict. It was also charged that provisions of the will

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should be clearly proven by two witnesses or by a copy of the will and one witness.

It is not a just criticism of the first of said two charges that the jury were directed to find the provisions of the will upon a mere preponderance of the evidence regardless of the number of witnesses testifying thereto. The jury could not have failed to understand that while two witnesses were necessary, nevertheless it required a preponderance of the evidence, and that such facts as were so supported should be returned.

An instruction asked by the appellant, that all of the contents of the will should be proven, was modified to direct that the substantial contents of said will should be proven. This modification, in view of what we have already said, was not erroneous.

An instruction in the following language was given: "I instruct you that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior; and, also, to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or a want of recollection."

This instruction was copied from Sackett's Instructions to Juries, p. 33, and *Blizzard v. Applegate*, 61 Ind. 368, is cited by the author in its support.

The instruction reviewed in the case cited did not so clearly invade the province of the jury as that given by the author, yet it was held to have been improper. The weight to be given to the testimony of any witness or class of witnesses is always a question for the jury and it is never proper to charge the jury, as a matter of law, that any witness or class of witnesses shall be received with greater consideration than any other. *Wollen v. Whitacre*, 91 Ind. 502; *Cline v. Lindsey*, 110 Ind. 337;

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Durham v. Smith, 120 Ind. 463; *Duvall v. Kenton*, 127 Ind. 178.

For the error in the charge given, the judgment of the circuit court is reversed.

DAILEY, J., did not participate in considering this appeal.

Filed Nov. 13, 1894.

 No. 16,982.

COLE V. GRAY ET AL.

QUIETING TITLE.—Complaint.—Demurrer.—A complaint in the usual form to quiet title to real estate, which alleges that the defendants have no interest in the property, and no lien of any kind thereon, is not rendered bad on demurrer because it appears by subsequent pleadings and the evidence that the defendant held a valid lien for taxes paid.

SAME.—Deed.—Can not be Varied by Parol.—Tax Lien.—Transferred by Deed Notwithstanding Oral Agreement.—A deed can not be contradicted, changed or modified by previous or contemporaneous oral negotiations, stipulations or agreements inconsistent with its terms; and so where the vendee of the holder of an invalid tax deed seeks to enforce the lien given by statute, an answer that at the time of taking his conveyance from the holder of the tax deed the plaintiff and his grantor had agreed that such conveyance should not transfer either the title or the lien for taxes, but should merely operate as a release of the lien, and that subsequently the defendant had paid to the plaintiff's grantor the full amount due on account of the tax sale and taken to himself a quitclaim deed, is bad.

SAME.—Redemption from Tax Sale.—Recorded Deed.—Notice.—In making redemption from a tax sale the owner is bound to know, where a conveyance from the holder of a tax deed to a third person is upon record, that such conveyance carried to the grantee the purchaser's lien.

From the Tipton Circuit Court.

R. N. Lamb and *R. Hill*, for appellant.

G. Shirts and *I. A. Kilbourne*, for appellees.

139	396
140	411
139	396
144	161
146	87
139	396
152	349
139	396
153	558

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McCABE, J.—The appellee John M. Gray brought this suit against the appellant and others, in the Hamilton Circuit Court, to quiet his title to several lots in the city of Noblesville, in the county of Hamilton, to wit: Lot 4, in square 2; lots 2 and 3, in square 3; lots 3 and 4, in square 6, all in Evans and Gray's addition; also the east half of out lot 9 in G. M. Shaw's addition in said city.

The circuit court overruled a demurrer to the complaint, assigning the insufficiency of the facts therein.

The appellant, Cole, answered the complaint by a general denial, and filed a cross-complaint against his codefendants and others.

The appellee John M. Gray answered the cross-complaint by a general denial and a second paragraph in confession and avoidance.

Some of the other parties were defaulted, and the rest of them answered the cross-complaint, but no question arises thereon.

There was a trial of the cause in the Hamilton Circuit Court, and a new trial as of right taken, and the venue of the cause was changed to the Tipton Circuit Court, where a trial of the issues by the court, without a jury, resulted in a finding and judgment in favor of the appellee John M. Gray, quieting his title in the lots mentioned, subject to a lien thereon in favor of the appellant, Cole, for \$7.20 for taxes paid for which said Cole had judgment.

The errors assigned call in question the action of the trial court in overruling the demurrer to the complaint and in overruling the demurrer to the second paragraph of the answer to the cross-complaint, and in overruling appellant's motion for a new trial for cause.

The complaint is in the usual form of a complaint to quiet title, alleging, in substance, that the plaintiff was

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the owner in fee simple of the lots in question, and that the defendants, the appellant and others, claimed some interest therein, but that they had no interest nor lien upon said premises, nor any part thereof.

The objection urged to this complaint is that it appears from the subsequent pleadings and from the evidence on the trial, that appellant, Cole, held a lien on the lots for money paid on an invalid tax sale thereof, and for taxes paid thereon by his grantor and himself while holding such invalid tax title.

It is contended by the appellant that the owner of real estate can not maintain an action to quiet his title against the holder of an invalid tax title without first tendering to such holder the amount due him on account of the lien for the purchase-money paid and subsequent taxes paid and keeping the tender good.

Many decisions of this court are cited in support of this contention.

One of the cases cited by counsel in support of their contention is *Willard v. Ames*, 130 Ind. 351. That was a suit also to quiet title, the complaint being in two paragraphs. The first paragraph was in the usual form, substantially the same as the complaint here. No question was raised as to that paragraph. The second paragraph showed specifically that the cloud upon the plaintiff's title, on account of which it was sought to quiet it, arose from a tax sale and deed, and proceeded upon the ground that the tax title was ineffectual to convey the title, and sought to have it declared void. And it was very properly held that the paragraph was bad because it disclosed that the defendant had a lien for the taxes paid, and that before the plaintiff can be heard in a court of equity to ask that such a sale and conveyance be set aside and declared void and his title quieted, he must do that which equity requires, namely, pay or tender that

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which has been expended for his benefit, there being no such payment or tender alleged in that case. To the same effect are all the cases cited by appellant's counsel on that point.

Manifestly, those cases have no application to the present complaint in this case, because it does not disclose the existence of any such lien; on the contrary, it expressly alleges that the defendants have not only no interest in the lots, but that they have no lien thereon of any kind.

The demurrer admits these averments to be true. A party can not demur to a pleading without admitting the truth of all material facts alleged for the purposes of the demurrer. These facts were material to the right of the plaintiff to maintain the action to quiet his title. The sufficiency of the facts in a pleading on a demurrer thereto can not be strengthened or weakened, added to or diminished by facts stated in other pleadings subsequently filed, or by the facts proven on the trial. The sole question presented by a demurrer to a pleading for want of sufficient facts is whether the facts stated therein, conceding them to be true, are sufficient in case of a complaint to constitute a cause of action, in case of an answer to constitute a defense, and in case of a reply to constitute an avoidance of the answer. In such case no question is presented as to the truth of the material facts stated.

We, therefore, hold that the complaint stated facts sufficient to constitute a cause of action and that the court did not err in overruling the demurrer thereto.

The cross-complaint was in two paragraphs. The first stated a cause of action to quiet the alleged title of the cross-complainant, Cole, to the lots already described, but did not disclose the nature of the claim that the

defendants to the cross-complaint were making to the lots.

The second paragraph, after stating substantially the same facts stated in the first paragraph, states that the cross-complainant's title to said lots is a deed executed by the auditor of the county, pursuant to a sale thereof for the nonpayment of taxes thereon, to one Abijah M. Jenkins, who afterwards conveyed the same by deeds to the cross-complainant, and that all of said deeds were duly and properly recorded in the recorder's office of Hamilton county. Moreover, the paragraph states that if, upon the final hearing of the cause, the court shall be of opinion that the cross-complainant's title to said real estate is invalid by reason of any informality, defect or irregularity in said tax sale or otherwise, then in that event the cross-complainant prays the court that the amount of taxes assessed against said real estate for which the same was sold at said tax sale shall be ascertained and computed together, with the taxes subsequently paid thereon by the cross-complainant and his grantor, said Abijah M. Jenkins.

The controlling question in the case arises on the demurrer to the second paragraph of the answer of the appellee John M. Gray to the cross-complaint of appellant.

The substance of that paragraph is that on September 4, 1888, Peter Gramling recovered a judgment against said appellee John M. Gray for \$155 and costs, and that said Gramling on October 1, 1889, duly assigned said judgment to the cross-complainant, Cole; that afterwards an execution was duly issued on said judgment whereon said lots were duly sold at sheriff's sale to said cross-complainant for \$150 on January 11, 1890, and a certificate of purchase was accordingly issued to him by the sheriff; that on February 15, 1887, and for many years

before that time the plaintiff appellee John M. Gray was, ever since has been, and still is, the owner of the lots already described, together with other real estate hereinafter described; that on the day last aforesaid the auditor and treasurer pretended to sell at public auction for the nonpayment of taxes thereon the real estate already described above, as well as the following, all situate in the said city of Noblesville, to wit, lot 5 in square 4 in F. W. Emmons' addition, lot 4 in square 4, lot 4 in square 2, all in the same addition, and outlot 9 in G. M. Shaw's addition; that the amount of the taxes due upon each of said parcels of real estate was not carried out upon the tax duplicate, but the amount thereof was set out in gross as against the whole, and was set out in gross in the notice of said tax sale; and in the notice of tax sale and delinquent list kept by the auditor, the said lots in said Evans' and Gray's addition were not described at all. The whole of the property was attempted to be sold by said officers at said tax sale in one body for the gross sum of \$160 to Abijah M. Jenkins, who paid said sum therefor, and a certificate of purchase was accordingly issued to him. But the plaintiff avers that the said tax sale was wholly ineffectual to convey title to said purchaser for any portion of said real estate for the reasons, among others, that there was no description of the part of said property in Evans' and Gray's addition in the notice of the sale, and for the reason that at the time of the said tax sale the said John M. Gray was, and for many years prior thereto had been, a *bona fide* resident and householder of said city, and he then and there was the owner of personal property consisting of horses, buggies, cows, library and household and other goods of more than the value of \$500, situate within the limits of said city, which might have been,

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but were not, sold for the payment of said taxes; that on February 25th, 1889, the auditor of said county executed to said Abijah M. Jenkins, pursuant to said sale, a deed for all the real estate already described above, which is the only title ever held by said Jenkins at any time for said real estate, and under which he had nothing but a lien for the amount of his purchase-money, interest, penalties and subsequent taxes paid; that afterwards, and while said Cole was the holder of said judgment, he was desirous of procuring the title to said lot 4 in square 2 in Evans' and Gray's addition, and proposed to accept the same in satisfaction of said judgment, and agreed to do so, and to pay said Jenkins \$15, in consideration of which Jenkins agreed to release his lien on said lot. The money was paid by said Cole, and to make said release effectual, and for no other purpose or consideration, the said Jenkins and wife executed to said Cole a quitclaim deed for said lot, but it was then and there expressly stipulated and agreed between the said Jenkins and said Cole that said release should in no manner impair the lien so held by said Jenkins as to the remainder of the real estate covered by said tax sale, nor should such arrangement in any way lessen the amount of money which said Jenkins was entitled to receive and recover from said Gray, and it was then and there expressly understood and agreed between said Cole and said Jenkins that the latter did not, by said transaction, in any manner sell, assign or transfer to said Cole any part of the lien so held by said Jenkins. But after said Cole received said deed for said last named lot, said Cole then declined to take from plaintiff, Gray, the said lot in satisfaction of said judgment, but demanded that plaintiff should, in addition thereto, convey to him other lots, and failing to agree in this said Cole proceeded to sell upon execution as first herein alleged. Afterwards, and

while Cole was still holding his sheriff's certificate for the portion of the real estate described therein as aforesaid, the year for redemption thereof not having expired, to wit: On March 5th, 1890, the said Jenkins and said Cole entered into an agreement by the terms of which the said Jenkins agreed to release and discharge his said tax lien as to said lots 2 and 3 in square 3, and lots 3 and 4 in square 6 in said Evans' and Gray's addition to the end that in the event that there should be no redemption from said sheriff's sale that the said Cole might gain title thereto by sheriff's deed free from any claim of the said Jenkins on account of said tax sale; but it was then stipulated and agreed between the said Jenkins and Cole that the said release should in no manner impair the said lien so held by him to the remainder of the real estate covered thereby, nor should said arrangement in any way lessen the amount of money which said Jenkins was entitled to recover from the said Gray on account of said tax sale, nor impair his right to recover the whole amount thereof from said Gray the same as if said arrangement had never been made; and in consideration that said Jenkins would so relinquish his right to hold said lien upon the portion of said lots covered by said sheriff's sale, and for no other consideration whatever the said Cole agreed to and did pay to said Jenkins at the date of such agreement the sum of \$50, and thereupon, in order to make said release effectual, the said Jenkins and wife executed to said Cole a quitclaim deed for the lots last herein described, and it was then expressly understood and agreed between said parties that said Jenkins did not thereby in any manner sell, assign or transfer to said Cole any portion of the lien held by said Jenkins, but the money paid by said Cole was only paid by him to induce said Jenkins to release the said lien upon the property in which Cole claimed an interest, and to induce

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said Jenkins to look to the remainder of said lots for the payment of said lien; and the said Cole has no interest in nor lien upon any portion of said real estate described in his cross-complaint unless some such interest is conferred by said quitclaim deeds from said Jenkins; that on November 19, 1890, plaintiff redeemed from said tax sale, so made as aforesaid by paying to the said Jenkins the full amount of his said lien, including penalty, interest and taxes paid by said Jenkins, which redemption money was then accepted by said Jenkins in full payment of his said lien, and in full recognition of the fact that said tax sale was ineffectual to convey title for the reasons aforesaid, and to fully carry out said redemption, and make the same effectual, the said Jenkins and wife then executed to plaintiff a quitclaim deed for all the real estate purporting to have been embraced in said sale, since which time the said Jenkins has neither had nor claimed any interest in, nor lien upon, any portion of said real estate, and by the payment of said lien to said Jenkins as aforesaid, the said real estate was entirely freed from any and all claims on the part of any one growing out of said tax sale, and no deductions whatever were made in such payment from the amount of such lien on account of any sum of money paid by said Cole to said Jenkins for the release aforesaid; that afterwards, and within the year allowed by law for redemption, to wit, on November 20, 1890, the plaintiff Gray redeemed from said sheriff's sale upon said Gramling judgment by paying the full amount of purchase-money, interest and costs, which sum of money was received by said Cole in full of said redemption, and at the same time the plaintiff paid the balance of said judgment which was also received and accepted by said Cole in full payment thereof; that said Cole paid the April installment of taxes in 1890 due upon the real estate de-

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scribed in his cross-complaint voluntarily, and with full knowledge that plaintiff intended to redeem from said sales, which taxes so paid in April, 1890, amounted to the sum of \$6.17. But before the commencement of this suit plaintiff offered to pay to said Cole the taxes which he had thus paid, with interest thereon, but said Cole refused to receive the same, and the plaintiff has ever since been, and still is, ready and willing to pay said sum.

Plaintiff therefore avers that cross-complainant has no title whatever to any portion of said real estate, nor lien thereon by purchase, payment or otherwise, on account of taxes or tax sales, and plaintiff therefore demands judgment for costs and other proper relief.

The sufficiency of this answer depends on the answer to the question: Can the terms and legal effect of a written contract or deed be contradicted, changed or modified by previous or contemporaneous oral negotiations, stipulations or agreements inconsistent with its terms? Because the substance and gist of the answer are that the deeds of conveyance from Jenkins to appellant Cole were not intended as conveyances either of the title or a transfer of the lien for taxes, but were intended, designed and agreed by oral contemporaneous stipulations to be nothing but a release of a lien for the taxes for which the property had been invalidly sold. It is true the answer does not aver that such previous or contemporaneous stipulations were oral, and not in writing, neither does it aver that they were in writing. In such a case it will be presumed that they were not in writing, but rested in parol. *Carlisle v. Brennan*, 67 Ind. 12; *Langford v. Freeman*, 60 Ind. 46; *Goodrich, Admr., v. Johnson, by Next Friends*, 66 Ind. 258. *Prima facie* the legal effect of the deeds from Jenkins to Cole

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was to transfer the title to Cole if Jenkins at the time had title to the lots.

But under the averments of the answer to the cross-complaint which, for the purposes of the demurrer are admitted to be true, he did not have title for the reason, among others, that it appears from such answer that the owner had personal property in the county at the time out of which the taxes might have been made. *Ellis v. Kenyon*, 25 Ind. 134; *Ward v. Montgomery*, 57 Ind. 276; *Woolen v. Rockefeller*, 81 Ind. 208; *Earle v. Simons*, 94 Ind. 573; *Sloan v. Sewell*, 81 Ind. 180.

When a tax deed proves ineffectual under the statute in force when this sale took place, to convey the title for any other cause than that the land shall not have been liable to taxation, or if liable, that the taxes thereon have been paid before the sale, or if the description is so imperfect as to fail to identify the land or lot, the lien which the State had for the taxes is transferred to the grantee, and vested in him, his heirs and assigns, as the direct legal effect given to the deed by the statute. Elliott's Sup., sections 2142 and 2144. *Morrison v. Jacoby*, 114 Ind. 84.

The burden of showing that the lots were not subject to taxation, or that they were not described so as to identify them, as well as that the taxes had been paid, is on the party who resists the enforcement of the lien, and in this case that is the plaintiff Gray. *Morrison v. Jacoby*, *supra*; *Scott v. Millikan*, 104 Ind. 75; *Earle v. Simons*, *supra*.

It is nowhere alleged in the answer that the description was not sufficient to identify the lots. Besides, it is not alleged that the defective description applied to all the lots. If only a part of the lots were so defectively described as that they could not be identified, the answer would be bad if it rested alone on the defective de-

scription, because as to those whose description was not thus defective the lien would not be defeated, and thus the answer purporting to be a full defense would only be a partial one, defeating, as it would, only a part of the lien. But, as before observed, the intention and theory of the answer is to defeat the lien by defeating the transfer thereof from Jenkins to Cole by virtue of the deeds. The answer seeks to do that by the introduction of parol evidence to vary and change the legal effect of such deeds.

It was held, in *Sage v. Jones, Admr.*, 47 Ind. 122, "that parol evidence is not admissible to vary, contradict, add to, or take from the terms of a written instrument or its legal effect." *Chapman v. Long*, 10 Ind. 465.

In *Oiler v. Gard*, 23 Ind. 212 (217), it is said: "The rule is, that all oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it, and that the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves."

To the same effect are *McClure v. Jeffrey*, 8 Ind. 79; *Madison, etc., Plank Road Co. v. Stevens*, 10 Ind. 1; *Oiler v. Bodkey*, 17 Ind. 600; *Woodall v. Greater*, 51 Ind. 539.

In 2 Devlin on Deeds, section 837, it is said: "The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all classes of construction, and the disregard of which often leads to erroneous conclusions."

And the same author, in section 840, says: "The intent, when clearly expressed, can not be altered by evidence of extraneous circumstances."

It has often been held by this court that all prior parol

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agreements relating to a sale of land are presumed to be merged in the deed, and that such agreements can not be proven to contradict the deed. *Turner v. Cool*, 23 Ind. 56; *Coleman v. Hart*, 25 Ind. 256; *Cincinnati, etc., R. R. Co. v. Pearce*, 28 Ind. 502; *Fouty v. Fouty*, 34 Ind. 433.

In 7 Am. and Eng. Encyc. of Law, 91, it is said: "When any judgment of any court, or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence."

Then follows numerous well known exceptions to this rule, but the case before us falls within none of them.

One exception to this rule is that a deed absolute on its face may, in equity, be shown, by parol evidence, to have been intended to have the effect of a mortgage merely. The foundation on which this exception rests is that under the circumstances of the deed appearing on its face to be absolute when it was intended to be a mortgage, it is presumed to have been occasioned by mistake or fraud. *Conwell v. Evill*, 4 Blackf. 67.

Nothing of that kind is claimed here. It is, however, claimed by appellees' learned counsel that the action of Gray in what he calls redeeming the whole of the lots from the tax sale by paying to Jenkins the whole amount due on account of such sale and taking Jenkins' quitclaim deed to himself therefor, is not a contradiction or

variation of the legal effect of the deeds from Jenkins to Cole, but is simply carrying into effect the oral agreement between Cole and Jenkins by which the latter was to have the right to collect the whole amount from Gray for which all the lots were liable on account of such tax sale.

This argument is unsound, because the right of Jenkins to receive the redemption money on the lots he had deeded to Cole depended entirely on the validity and binding force of his oral agreement with Cole that he might so receive it. If no other contract than the deeds had been made, all must admit that he would not have that right, because it has been held by this court that it is only the last vendee of an invalid tax title that can maintain an action to enforce the lien for the taxes. *Morton v. Shortridge*, 38 Ind. 492.

Therefore, the acceptance of the redemption money by Jenkins can have no effect on Cole's rights unless the oral agreement was valid as against Cole and as against his deeds. Having been made contemporaneously with such deeds for the purpose of varying their legal effect, as we have seen, such oral agreements were invalid, and did not vary or change the legal effect of the deeds.

Conceding, without deciding, that Gray might redeem from the tax sale by taking a deed from the purchaser thereat, Jenkins, yet, as the cross-complaint to which Gray's answer in confession and avoidance was addressed showed that the deeds were on record in the proper recorder's office, the answer not denying that fact, admitted the same for the purposes of the cross-action. Burns R. S. 1894, section 386; R. S. 1881, section 383.

Gray was, therefore, bound to know when he paid the whole amount of redemption money to Jenkins, that Jenkins had made deeds purporting to convey to Cole a part of the lots sold to Jenkins at tax sale, and he was

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bound to know that the legal effect of those deeds was to transfer the lien to Cole for the taxes due on those lots.

We see no escape from the conclusion that the deeds from Jenkins to Cole vested in the latter the lien for taxes for which the lots embraced in them had been sold, together with the penalties, interest and subsequent tax paid, and that the court below erred in overruling the demurrer to the second paragraph of Gray's answer to the cross-complaint.

This leads to the further conclusion that the court below erred in overruling the motion for a new trial on account of the error in admitting parol evidence to vary the legal effect of the deeds in question.

The judgment is reversed and the cause remanded, with instructions to sustain the motion for a new trial.

Filed Nov. 21, 1894.

END OF MAY TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, NOVEMBER TERM, 1894, IN THE SEV-
 ENTY-NINTH YEAR OF THE STATE.

No. 16,861.

NEUTZ v. JACKSON HILL COAL AND COKE COMPANY.

NEGLIGENCE.—Of Fellow Servant.—Vice-Principal.—Defective Cars Fur-
nished for Shipping Purposes.—Master and Servant.—Personal Injury.
 —Where cars furnished to a coal and coke company, for shipping
 purposes, were defective, in that the brakes were worn out, and in
 some instances entirely wanting, the cars being placed on the grade
 above the "tipple," or place of loading, the defective cars being
 placed between other cars, and in moving a car down near to the
 "tipple," by servants of the coal and coke company, whose duty it
 was to inspect and test the brakes on the cars so as to see that they
 could be let down to a point near the "tipple" in safety, a car with de-
 fective brakes, and otherwise unsecured, followed at a high rate of
 speed, striking the car in charge of said servants, and driving it into
 collision with that upon which another servant was engaged in load-
 ing, thereby inflicting injuries upon him,—the failure to inspect,
 to set brakes, or to block the wheels was negligence in the use of, and
 not in the supplying of, instrumentalities, and was consequently the
 negligence of fellow servants, and not of vice-principals. The ex-
 tent of the coal and coke company's control over the cars was in
 the use of them for loading coal, and it was not responsible to the
 injured servant, or any one else, for their sufficiency as a means of
 transportation.

(411)

139	411
143	484
139	411
146	570

189	411
155	40

139	411
168	230

139	411
170	5

Neutz v. Jackson Hill Coal and Coke Company.

MASTER AND SERVANT.—*Extra Hazard.—Not in Issue.—Finding Disregarded.*—Where the question of extra hazard is not in issue, a finding as to that fact by the jury must be disregarded.

From the Sullivan Circuit Court.

W. C. Hultz, W. R. Nesbit, J. T. Beasley, A. B. Williams, B. K. Elliott, W. F. Elliott and G. W. Buff, for appellant.

J. S. Bays, S. O. Pickens, S. N. Chambers and C. W. Moores, for appellee.

HACKNEY, C. J.—The questions presented by the record in this case arise upon the action of the trial court in rendering judgment for the appellee upon the special verdict of the jury. By said verdict the jury found that the appellee was engaged in mining and shipping coal, and for its convenience in said business it had constructed a switch or short line of railway from the Evansville and Terre Haute Railway to and for a short distance beyond its mines. The grade of said line from said mine outward was so inclined that when cars were placed upon it, beyond the mines, they would, by their own weight, run back to the mines when not restrained by brakes or other obstruction. At the mines the appellee had erected a shed and "tipple" or dumping machinery on the line of said switch in such manner as to extend out over the track and from which cars were loaded with coal from the mines.

On the 14th and 15th days of May, 1891, the appellee procured several cars to be run in upon said switch beyond the mines, four of which cars had either badly worn or broken brakes, or had none to hold them in place and prevent their return down the track to the mines, and that up to the morning of the 16th day of May they were held back by another car. Prior to said 15th day of May the appellant had been in the employ

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of the appellee, his work consisting of digging, cutting and shoveling under ground in the mine. On that day he was required to assist in loading cars from said coal shed, and said work was continued into the 16th day of the month. Said work, it is found, was more dangerous than that he had previously done; "that on the 16th day of May, 1891, and for some time prior thereto, the defendant had duly authorized and employed George Prudo and Elisha Burress, agents and servants of defendant, to move cars standing on said branch railroad or switch, beyond said mine, to a point near to said 'tipple' where they were to be taken and loaded with coal; and during said time the said Prudo and Burress were duly and legally employed by defendant to examine, investigate, inspect, and test the brakes on said cars so as to see that said cars could be let down said branch railroad or switch to said point near said 'tipple', in safety, and to secure and safely fasten all cars standing on said branch railroad or switch, so that the work around and under said 'tipple' could be carried on in safety; that said Prudo and Burress, on said 16th day of May, 1891, had no control over the plaintiff or his work, nor had the plaintiff any control over said Prudo and Burress, or their said work on said day; that on said 16th day of May, 1891, * * while plaintiff was in said car in pursuance of his said work, under the directions of the defendant, as aforesaid, the said George Prudo and Elisha Burress went to where said cars were situated on said branch railroad or switch, as aforesaid, a distance of one hundred yards from where said plaintiff was at work, for the purpose of letting one of said cars down said switch to a point near where plaintiff was at work, so that it should be loaded with coal; that said Prudo and Burress failed to properly and carefully investigate, inspect or test the condition of the brakes on said cars; that if said Prudo

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and Burress, or either of them, had properly and carefully inspected or tested said brakes, they could easily have seen and known that the brakes on the two cars next behind the one to be let down to the 'tipple' were worn out and useless, and that there were no brakes at all on said box car, and that said cars would not stand on said inclined branch railroad or switch when said front car was removed from them down said switch"; that said defective cars could have been detained where they had been standing by placing a chock under their wheels, to have done which was suggested by ordinary care and prudence; that said first car was permitted by said Prudo and Burress to run down the switch without securing said other cars when, without appellant's fault or negligence, said other cars followed at a high rate of speed, striking said first car and driving it into collision with that upon which the appellant was engaged, thereby throwing him from said car and inflicting the injuries complained of.

Other facts are found excusing the appellant from contributory fault.

The special verdict, upon the argument of the parties, presents but two questions: Did the greater dangers of loading cars, over those of working down in the mines, enhance the appellant's right of recovery? and was the negligence of noninspection, which unquestionably occasioned the injury, the negligence of fellow servants or of vice-principals?

Upon the issues there was no question presented as to the extra hazards of the service in which the appellant was injured, and that finding by the jury must be disregarded. *Brown v. Will*, 103 Ind. 71; *Thomas v. Dale*, 86 Ind. 435; *Town of Cicero v. Clifford*, 53 Ind. 191; *Boardman v. Griffin*, 52 Ind. 102; *Hasselman v. Carroll*,

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102 Ind. 153; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275.

The finding, however, is not that such hazards were greater than the appellant had contracted to perform but simply that they were greater than those of the service he had been performing. If, therefore, the question had been in issue it is probable that the finding would have been insufficient, since extra hazards are necessarily those not contemplated by the contract of employment.

The second question is not entirely free from embarrassment, and requires careful discrimination. The appellant insists that the duty of the master to provide for the servant a safe working place made it a part of the master's duty to inspect the cars, and guard its servants against injury from defects therein, and that such duty could not be delegated to one who, in performing it, would stand in the relation of a fellow-servant. That this is the ordinary rule there can be no doubt, when considered with relation to appliances and instrumentalities of the service provided by the master. *Chicago, etc., R. R. Co. v. Fry, Admx.*, 131 Ind. 319; *Ft. Wayne, etc., R. R. Co. v. Gruff*, 132 Ind. 13; *Ohio, etc., R. W. Co. v. Percy, Admx.*, 128 Ind. 197; *Cincinnati, etc., R. R. Co. v. McMullen, Admr.*, 117 Ind. 439.

These cases have special application to car inspection, while the following, cited by the appellant, apply the general rule above suggested. *Nall, Admx., v. Louisville, etc., R. W. Co.*, 129 Ind. 260; *Louisville, etc., R. W. Co., v. Graham, Admr.*, 124 Ind. 89; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124; *Brazil Block Coal Co. v. Young*, 117 Ind. 520.

The appellee does not question the general rule or the soundness of the special cases cited, but it is insisted that in the present case the master was not, in relation

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to the defective cars, furnishing appliances and instrumentalities, and that therefore its only duty was to supply competent and skillful inspectors subjected to proper instructions; that this being done the master performed its full duty. To this contention is cited *Cincinnati, etc., R. R. Co. v. McMullen*, *supra*.

In that case, after stating the general rule, in its application to cases where the master furnished the cars or other instrumentalities of the service, it was said: "In respect to cars received by one railroad company from another in the course of transportation, since the duty of the receiving company is to receive and forward the cars over its road, the rule above enunciated is not applicable in its strictness. In such a case it may be said with much plausibility, that it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection and give notice of defects if any are found, and that this duty is performed by the employment of * competent and skillful inspectors, who are subjected to proper rules and instructions. In cases of that class, it has been held that inspectors of cars, and those acting as brakemen, were fellow-servants within the common law rule. *Mackin v. Boston, etc., R. R. Co.*, 135 Mass. 201; *Keith v. New Haven, etc., Co.*, 140 Mass. 175; *Smith v. Flint, etc., R. W. Co.*, 46 Mich. 258; *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318."

As further supporting the distinction thus made the appellee cites *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13. See also Bailey's Master's Liability for Injuries to Servants, p. 279.

In the case before us it is not expressly found that the defective cars were furnished by the appellee, nor that they were furnished by another, but as we are not at liberty to aid the verdict in fixing liability by intendments we must presume the fact as most unfavorable to

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the plaintiff. So presuming, we accept the finding as if it declared such cars to have been supplied to the appellee by another company and for temporary use in the appellee's shipping. We are, therefore, confronted with the question of the adoption or rejection of the distinction suggested in the case of *Cincinnati, etc., R. R. Co. v. McMullen, supra*.

In the present case the inspectors and the appellant occupied a relation to the appellee in all respects identical with that occupied by the inspectors and brakemen of railway companies handling cars of other companies in the course of the master's business. The cars came, not as instruments of the service supplied by the master, but as incidents of its business, and from the dependence of the master upon those not in any manner connected with such business or subject to the master's control. If the defects had been in the original construction of the cars it could not be said that such defects were chargeable to the negligence of the appellee, nor can it be said with greater reason that the ill repair was from the fault of the appellee, or that a duty rested upon the appellee to make the repairs. The extent of the appellee's control over the cars was in the use of them for loading coal, and it was not responsible to the appellant, or any one else, for their sufficiency as a means of transportation. The failure to inspect, to set brakes, or to block the wheels, when the first car was removed, was negligence in the use and not in the supplying of instrumentalities. One line of distinction between vice-principals and co-employees is in the duty, in one instance, to supply or maintain instrumentalities of the service, and in the other of using the instrumentalities supplied. Negligence in the first, though that of a servant, is the master's negligence, while in the second the negligence is

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that of a fellow-servant. This distinction keeps in view the proposition that where the master himself participates in the use, and the negligence is his own, he may not be said to be a fellow-servant.

We conclude that the exception to the general rule, as suggested in the *Cincinnati, etc., R. R. Co. v. McMullen*, *supra*, is applicable in this case, and supports the action of the lower court.

The case of *Hoosier Stone Co. v. McCain*, 133 Ind. 231, is not in conflict with our conclusion. There the distinction here urged was not suggested or considered.

The judgment of the circuit court is affirmed.

Filed Oct. 9, 1894.

ON PETITION FOR A REHEARING.

HACKNEY, J.—Appellant's learned counsel have supported their petition for a rehearing by two able and elaborate briefs. They have discussed the two questions shown by the original opinion to have been presented by the record, namely, the extra hazards of the service in which the appellant was injured as compared with the service performed before, and the fellow-servant rule, as applied to inspectors of cars, furnished by a railroad company to a shipper, and an injured servant of such shipper.

The first proposition is discussed in both briefs without reference to or consideration of our opinion, originally expressed, that no such question was made an issue by the complaint, and that the finding was not that the extra hazard was beyond that contemplated by the contract of employment.

In one of the briefs, counsel suggest that the court overlooked and failed to consider the question. We are constrained to believe that counsel have either not read

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the court's opinion or that they have overlooked the decision of the question.

The proposition with reference to the fellow-servant rule has been again considered by us. A majority of our members adhere to the conclusion reached in the original opinion, while it is the opinion of a minority of the members that the original opinion went quite as far as possible in the direction of appellant's position, and that the correct rule would not even require a shipper, obtaining a car from a railroad company for loading stock, grain, coal or other material, to supply inspection in order to protect himself from liability to his servant who is injured from defects in the car while assisting in such loading.

While the writer does not accept that view of the present case, it must be admitted that if a farmer takes hogs to a railway for shipment in the company's car, it is reasonable and the theory plausible that he should not be required, at the hazard of liability, to inspect the car for the protection of his servant who aids him in loading the stock.

The petition is overruled.

Filed Dec. 21, 1894.

No. 16,893.

PHILLIPS v. KENNEDY ET UX.

139	419
147	422

FRAUDULENT CONVEYANCE.—*Husband and Wife Joining in Conveyance of Husband's Lands for the Purpose of Retaking it as Tenants by Entireties.*—*Exemption from Execution.*—Where A, his wife joining him, conveys land held by him in fee simple to B, without consideration, who, according to agreement, immediately reconveys the same to A and wife as tenants by entireties, A not having prop-

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erty left, over and above his legal exemptions, to pay his unsecured debts, such conveyance was fraudulent as against such debtors, and may be set aside.

SAME.—Special Finding.—Fraud as an Ultimate Fact.—Recovery.— In an action to set aside a fraudulent conveyance, where the facts are specially found, there can be no recovery in the absence of a finding of fraud as an ultimate fact.

From the DeKalb Circuit Court.

C. M. Phillips, for appellant.

J. F. Shuman and F. S. Roby, for appellees.

HOWARD, J.—This was an action by appellant against appellees to set aside an alleged fraudulent conveyance of real estate, and to subject the land so conveyed to the payment of a judgment in favor of appellant.

There was a special finding of facts by the court, followed by conclusions of law and a judgment for appellees.

The conclusions of law and the overruling of the motion for a new trial are assigned as errors.

The facts found by the court, so far as they need be set out, are as follows:

"1, 2. That on the 5th day of August, 1891, the appellee William Kennedy was the owner, in fee simple, of the land in controversy, situated in DeKalb county, which was, at the time, of the value of \$4,000.

"3. That the appellee William is aged fifty-seven years, and his wife, the appellee Olive, is aged fifty-six years; that they have a son and daughter, both married and living separate from appellees.

"4, 5. That on said 5th day of August, 1891, the appellee William was indebted in the aggregate sum of \$601; of which amount \$500 was evidenced by promissory notes, each secured by Norman T. Jackman, who was then, and is now, solvent and able to pay the amounts so secured by him; and that \$96 of the re-

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mainder of said indebtedness has since been paid by the appellee William Kennedy.

"6. That on said 5th day of August, the appellee William Kennedy owned personal property of the value of \$600, and no more, and that he was then, and still is, a resident householder of DeKalb county, and, as such, at all times herein named, was entitled to the benefit of the exemption laws of this State.

"7. That on said 5th day of August, the appellees were the owners, as tenants by entireties, of a house and lot in Waterloo, DeKalb county, of the value of \$600, and of no other property.

"8, 9. That on said 5th day of August, the appellee William Kennedy, his wife, the appellee Olive, joining, conveyed the land in controversy to Norman T. Jackman, who paid nothing therefor and took the same for the purpose of conveying it to appellees; that on the same day, Norman T. Jackman conveyed the land to appellees as tenants by entireties.

"10. That prior to the execution of said deeds, and as part of the same transaction, appellees agreed between themselves that the house and lot held by them as tenants by entireties, and situated at Waterloo, should be sold and the proceeds used by William Kennedy in paying his debts.

"11. That William Kennedy received no consideration for the conveyance of said real estate.

"12. That on the 1st day of September, 1891, appellant began an action in the justice court against said William Kennedy on contract, which action was appealed to the DeKalb Circuit Court, and resulted in a verdict and judgment in favor of appellant, in the sum of five dollars; that said judgment is in full force, and wholly unpaid; that execution was issued upon said judgment, against the said appellee, and was returned unsatisfied for

Phillips v. Kennedy *et ux.*

the reason that no property could be found upon which to levy the same; that said judgment was rendered upon indebtedness existing on August 5, 1891, and prior thereto, on contract, as before found.

"13. That at the time said real estate was so conveyed to appellees, the appellee Olive Kennedy did not know that her coappellee was indebted to appellant, or that appellant claimed such debt to exist, and that in all of said transactions she acted in good faith and without fraudulent or wrongful intention.

"14. That the appellee William Kennedy has not had, since the rendition of said judgment, and does not now have, sufficient property, over and above his legal exemptions, to pay his debts.

"15. That after the execution of the conveyances aforesaid, and the transfer of the title of said land to appellees, they were unable to sell the house and lot in Waterloo; that, failing to do so, they mortgaged it to secure a loan of \$250, which sum was used by William Kennedy in paying his debts aforesaid. At that time the appellee Olive Kennedy knew that appellant's judgment against her coappellee was unpaid.

"16. That the appellee William Kennedy in making the conveyances and transfer aforesaid, acted in good faith for the purpose of securing to his wife the use of all said real estate, in the event of her surviving him, and without any intention to hinder, delay or defraud any person."

We think it sufficiently appears from these findings, that the transfer of title to the land in question, made by William Kennedy, through Jackman as trustee, to appellees as husband and wife, was without consideration; and, consequently, that the appellee Olive Kennedy is affected by any fraud intended by her coappellee, even though she may herself at the time have had no

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knowledge of such fraud, if any existed. *Mendenhall v. Treadway*, 44 Ind. 131; *Spinner v. Weick*, 50 Ind. 213; *Spaulding v. Blythe*, 73 Ind. 93; *McAnich v. Dennis*, 123 Ind. 21; *Roberts v. Farmers', etc., Bank*, 137 Ind. 697.

Counsel for appellees say that the eleventh finding, in which it is expressly stated that William Kennedy received no consideration for such conveyance, is but a conclusion, and should be disregarded. However that may be, it is clear from other findings that no consideration moved to William Kennedy from the transfer.

Neither can it be said that it is shown that Olive Kennedy gave any consideration. Any interest held by her in the land as the wife of William Kennedy was by the transaction increased to a larger interest in the same land. If the conveyance were to a third person it would be different, and the yielding of her inchoate interest might, in a proper case, be regarded as a consideration upon which she would herself be entitled to recover. *Jarboe v. Severin*, 85 Ind. 496.

The case here is quite different. William Kennedy parted with his lands without receiving anything in return out of which he might pay the debts which before the sale could be collected out of the lands. The absence of such consideration to him is the badge of fraud upon his creditors. He has parted with the property upon the possession and ownership of which he had been given credit, and he has received nothing in exchange which may be reached by his creditors. They are thus cheated, hindered, and delayed.

The court finds that at the time of the transfer, the appellees owned another piece of property by entireties, which they then agreed should be sold to pay William Kennedy's debts. It is not found that the property was transferred to him for that purpose.

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It may be conceded that such an agreement tends to show good intention on the part of appellees. But an understanding between them of that nature, however praiseworthy, could not be carried into effect by creditors. The agreement could have but a moral bearing. The intent of which the law takes notice is evidenced by the acts of the parties.

Mr. Bump, in his work on *Fraudulent Conveyances*, p. 274, says of creditors under such circumstances, that "It is true that they frequently look to the debtor's honesty, industry and skill in business, but the law can not take these into account, for they do not afford any means by which the payment of debts can be enforced."

An inspection of findings 4, 5, and 15 will serve to strengthen this view. William Kennedy's secured debts amounted to \$500, the unsecured to \$101. On failure to sell the Waterloo property it was mortgaged for \$250. If the agreement to use the proceeds of that property in payment of William Kennedy's debts were made in good faith, appellees would first make payment of the unsecured debts, of which appellant's was a part, and all of which could have been paid by the money so obtained. It appears, too, that at the time of obtaining this \$250, the appellee, Olive Kennedy, knew that appellant's judgment was unpaid. It seems very clear that there was no intention to pay the debt due appellant.

As appellees thus showed an unwillingness to pay appellant's judgment out of their common property, and as William Kennedy had no separate means left, on deducting his statutory exemption, out of which appellant could enforce his claim, after the transfer of the four thousand dollar farm, we are driven to the conclusion that this transfer was a fraud upon appellant.

The fact that appellees had, for some time, contemplated such a transfer as a security for Olive Kennedy's

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old age, can not affect this conclusion; neither can the fact that appellant's judgment was a small one. If the debt was small, it could the more easily be paid; and the transfer might then be completed for the honest purpose for which it was originally intended.

The judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion and to render judgment for the appellant.

Filed Oct. 16, 1894.

ON PETITION FOR A REHEARING.

HOWARD, J.—The appellees have filed a petition and brief for a rehearing of this case, and also a motion to modify the mandate.

Nothing in the courteous argument of the learned counsel has satisfied us that the opinion is incorrect as to the merits of the case. The transactions complained of certainly showed fraud as to appellant's debt.

The petition for a rehearing is overruled.

But, on reflection, we are of opinion that the mandate should be modified as prayed for. The court did not find fraud as an ultimate fact; though, as we think, it should be inferred from the facts found. The facts as found, however, in the absence of a finding of fraud against appellees, will not support a judgment against them.

The mandate is so modified, therefore, that the judgment is reversed, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed Dec. 20, 1894.

The State v. Atkinson.

No. 17,425.

THE STATE v. ATKINSON.

139	426
153	4

CRIMINAL LAW.—*Sale of Intoxicating Liquors.*—*Legal Holidays.*—*Thirtieth Day of May.*—*Statute Construed.*—The 30th day of May is not a legal holiday within the meaning of section 2098, R. S. 1881, making it unlawful to sell intoxicating liquor on certain days. It is not a general legal holiday, but is simply a legal holiday in relation to commercial paper, and for no other purpose.

CONSTITUTIONAL LAW.—*When Such Question Will Not Be Decided.*—*Supreme Court Practice.*—The appellate tribunal will not decide a constitutional question when such decision is not absolutely necessary to a disposition of the cause upon its merits.

From the Jay Circuit Court.

A. G. Smith, Attorney-General, and R. H. Hartford, for State.

C. Corwin and J. M. Smith, for appellee.

COFFEY, C. J.—This was a prosecution by the State against the appellee, for an alleged violation of the provisions of section 2098, R. S. 1881, which provides that "Whoever shall sell, barter, or give away to be drunk as a beverage, any spiritous, vinous, malt or other intoxicating liquor, upon Sunday, the fourth day of July, the first day of January, the twenty-fifth day of December, * * * Thanksgiving day as designated by proclamation of the Governor of this State or the President of the United States, or any legal holiday, * * * shall be fined," etc.

It is alleged in the indictment, that the appellee violated the provisions of this statute by selling intoxicating liquor to be drunk as a beverage, on the 30th day of May, 1892.

The court, on motion of the appellee, quashed the indictment, from which ruling the State appeals to this court, and assigns error.

The only question presented and discussed by counsel is the question as to whether the thirtieth day of May is

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a legal holiday, in this State, within the meaning of this statute.

In the case of *Ruge v. State*, 62 Ind. 388, it was held that none but general legal holidays fell within the provisions of this statute, and as there was not, at that time, any statute in this State making the 4th day of July a general legal holiday, it was held not to be a violation of the statute to sell on that day.

By an act of the General Assembly, passed in 1875, Act of 1875, p. 66, R. S. 1881, section 5517, it is provided that: "The following days, to wit: The first day of the week, commonly called Sunday; the first day of January, commonly called New Year's day; the fourth day of July; the twenty-fifth day of December, commonly called Christmas day; and any day appointed or recommended by the President of the United States or the Governor of the State of Indiana as a day of public fast or thanksgiving, shall be holidays within the State of Indiana for all purposes of presenting for payment or acceptance, for the maturity and protest, and giving notice for the dishonor of bills of exchange, bank checks, promissory notes, or other negotiable or commercial paper; and all notes, drafts, checks, or other negotiable or commercial paper, falling due or maturing on either of said holidays, shall be deemed as having matured on the day previous."

By an act approved March 5, 1889, Elliott's Supplement, section 1789, the above act was amended by adding thereto the twenty-second day of February, the thirtieth day of May and the day of any general, national, or State election.

At the general session of the General Assembly, in 1891, the following act was passed (Acts 1891, p. 394), namely:

"An act to amend an act entitled 'An act in relation to promissory notes, bank checks and bills of exchange,

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and to designate the holidays to be observed in the presentment, acceptance and payment of the same, approved March the 16th, 1875, and declaring an emergency,' and amended March 5, 1889, the same being section 5517 of the Revised Statutes of 1881, and declaring an emergency.

“[Approved March 9, 1891.]”

“Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That the above amended act be amended to read as follows: The following days to wit: The first day of the week, commonly called Sunday; the first day of January, commonly called New Year's day; the fourth day of July; the twenty-fifth day of December, commonly called Christmas day; and any day appointed or recommended by the President of the United States or the Governor of the State of Indiana, as the day of public fast or thanksgiving; the twenty-second day of February, commonly called Washington's birthday; the thirtieth day of May, commonly called Memorial day, and the first Monday of September, commonly known as labor day; the day of any general, national, or State election, shall be legal holidays within the State of Indiana; and all bills of exchange, bank checks, promissory notes, or other negotiable or commercial paper, falling due or maturing on either of said holidays, shall be deemed as having matured on the day previous, and when any of said holidays come on Monday, all bills of exchange, bank checks, promissory notes or other negotiable or commercial paper maturing thereon shall be deemed as having matured on Saturday previous, and when the legal holiday comes on Sunday the day following shall be the holiday.”

It is contended by the State that under the provisions of this act the thirtieth day of May is a legal holiday within the terms of section 2098, *supra*, under which this

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prosecution was instituted, while on the other hand it is contended by the appellee:

First. That the act last above set out is unconstitutional, because it attempts to amend a statute which had been merged in a former amendment.

Second. That conceding it to be a valid law, it does not constitute the 30th day of May a legal holiday within the meaning of section 2098.

While the constitutional question here sought to be presented is, in a sense, involved, it is not, in our opinion, involved in such a manner as to require its decision. It is well settled that a court of last resort will not decide a constitutional question when such decision is not absolutely necessary to a disposition of the cause upon its merits. *Parker v. State, ex rel.*, 133 Ind. 178.

Assuming, without deciding, that the act of 1891 above set out is constitutional, it does not purport to constitute the 30th day of May a general legal holiday. The act, upon its face, purports to be an act in relation to commercial paper, and it makes the 30th day of May, and the other days therein named, a legal holiday in relation to such paper, and for no other purpose.. *Hadley v. Musselman*, 104 Ind. 459.

Many of the days named in this last act are named in section 2098, *supra*, but the 30th day of May is not so named, and as it is not made a general legal holiday by any statute of the State, it is not a holiday within the meaning of section 2098. *Ruge v. State, supra*.

It follows, from what we have said, that the circuit court did not err in quashing the indictment in this case, whether the act of 1891 is to be regarded as a valid enactment or whether it is to be regarded as unconstitutional and void.

Judgment affirmed.

Filed Nov. 27, 1894.

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No. 14,002.

THE PENNSYLVANIA COMPANY v. MCCAFFREY, ADMINISTRATRIX.

139	430
160	28
139	430
161	408
162	668
139	430
166	70
168	474

139	430
169	288

NEGLIGENCE.—Sudden Danger.—Conduct of Imperiled Person.—Contributory Negligence.—If one acts naturally in a case of sudden and instant peril put on him by another, and is injured, he is not guilty of negligence, although afterwards, out of the presence of danger, with time to reflect, and in the light of all the known facts, it may appear that another course of conduct might have led to safety.

RAILROAD.—Master and Servant.—Section Foreman.—Sudden Peril.—A section foreman who, after a train has passed, orders his hand car placed upon the track, and while it is being so placed, suddenly discovers that the train, without warning is backing down the track, and hurriedly attempts to get the hand car out of the way, and then, being unable to do so, attempts to step off the track and in doing so falls and is killed by the hand car being pushed upon him by the train, is not guilty of negligence.

SAME.—Excessive Hours of Employment.—Railroad Company Bound to Know that Employees Will Leave Train to get Food.—Where a railroad company so arranges the time schedule for one of its trains that the train crew are required to work nineteen hours consecutively each day, without relief or provision for food, the company is bound to know that the men will leave the train at intervals for food, and it will be held to assent thereto, and their so leaving the train for such a purpose is not negligence on their part.

SAME.—Railroad Company Must Provide Enough Servants at all Times.—It is the duty of a railroad company to provide a sufficient force for the proper management of its trains, and when, by reason of the number of hours of continuous service some of the trainmen are habitually compelled by hunger to temporarily leave the train, it is the duty of the company to either stop the train until their return or to supply their places with other competent men, and for an injury resulting from a breach of this duty it is liable.

SAME.—Liability of Railroad Company to Section Foreman.—Case Stated.—A railroad company which requires such continuous service from a train crew as to be chargeable with notice that they leave the train to obtain food is liable for the death of a section foreman who, although knowing of the habit but not shown to have had knowledge of the absence of the conductor and engineer on the particular occasion, and being without fault, is killed by reason of the train moving backwards upon the track in sole charge of the

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fireman, without any signals being given, and without any signalman on the rear car to give warning of danger.

MASTER AND SERVANT.—*Notice to Employer*.—An employe is not, as a condition precedent to recovery for an injury, required to notify his employer of a fact which the employer is bound to know.

From the Clark Circuit Court.

S. Stansifer, for appellant.

A. C. Harris, J. H. Stotsenburg and E. B. Stotsenburg, for appellee.

DAILEY, J.—The facts in this case, as shown by the record, are these:

The appellant, as lessee, operates the Jeffersonville, Madison and New Albany Railway. It runs a passenger train from Louisville, via Jeffersonville, to New Albany, called the "dinkey." The crew consists of a conductor, brakeman, engineer and fireman. They go on duty at 5 A. M. each day, and, as appears by the company's card, remain on duty continuously until midnight. On April 28, 1885, the crew, consisting of Bush, conductor; Brooks, brakeman; Parr, engineer; and Eisele, fireman, took the "dinkey" train to run from 5 A. M. until midnight. There were fourteen stops each way. No provision was made for the men to get their meals. The crew lived in New Albany. They could not work nineteen consecutive hours without food. The fireman's little daughter brought his meals in a pail, which he ate on the engine.

It is not shown how Brooks, the brakeman, lived, as the company had him in the service on the road so that he was not present at the trial. On the afternoon of April 28, 1885, appellee's intestate, Richard McCaffrey, the section boss, was at work with four laborers surfacing the track in the city of New Albany. His hand car was standing in an alley immediately north of the track and a few squares east of the State street station, the

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western terminus of this line, at which passengers were received and delivered. Bush, the conductor, and Parr, the engineer, lived several squares east of the station. As the train came from Louisville to New Albany, due at 5:40 P. M., the engineer and conductor left the train and ran to their homes to eat their suppers, while the fireman and brakeman were left in charge of the train to take the passengers on to the station. As soon as the train, containing three cars, pulled by McCaffrey and his men, they gathered up their tools to quit work for the day, and began to put their hand car on the track to run eastwardly to the hand car house about one mile distant. McCaffrey resided near by there, on Fifteenth street. The "Air Line" company, at that time, used the J., M. & I. track from New Albany into Louisville, and an east bound train would soon pass. To allow this it became necessary for the "dinkey" train to run into a switch, the east end, or head, of which was 190 feet east of the alley wherein McCaffrey's hand car stood. Brooks, the brakeman, got off and ran along to open the switch, but Eisele, the fireman, ran over the head of the switch before stopping the train. He says: "I lost the air and ran over the switch." There was then no one of the crew on the train but the fireman. Brooks was on the ground to open the switch when he could, and the engineer and conductor were eating hasty suppers at their respective homes. McKenna, the superintendent of the Pennsylvania Company, the officer having the operating of this train in charge, knew that the conductor and engineer, driven by hunger, habitually left the train to get something to eat, as was done this afternoon.

Parr, the engineer, testifies: "That was the only way I had to get something to eat unless it was brought to me in a basket."

A special policeman named Shay, in the employ of the

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company, patrolling the track in New Albany, was required to get on the train to assist the passengers off, but he had no authority to take command of the train, and did not on this occasion. The train was thus left, by permission of the company, with no one to operate it except the fireman. No bell was rung, or other signal given of the backward movement of the train by Eisele. He could not watch or ring the bell, as he was occupied in handling the engine.

It was shown by the appellant that on previous occasions they sometimes let little boys climb on the engine and ring the bell when the engineer was off securing something to eat, but it was not so in this instance. There was no one to stand on the rear platform, as there should have been, or otherwise to warn the decedent and his men that the train must move backward at once. Eisele reversed the engine and put on steam and moved back just as McCaffrey and his men were putting the hand car, which weighed 700 pounds, on the track. They put it on in the usual manner; that is, they carried it on the track and placed it at right angles therewith, and then lifted it quarter round so as to put the wheels on the rails. As they were so engaged the train backed silently down upon them. Perry Quirk, one of the section hands, tells the rest of the story in this artless way: "It was just six o'clock, and we were putting on the hand car at the alley. We had hold of her, and were trying to put her on, and I seen the train coming up and I said, 'boys, we can not make it.' We were looking toward the train and we could see the cars coming down, and I said 'we can not make it,' and we dropped the car and stepped out. I hollered; I said 'boys, we can not make it.' I seen McCaffrey stepping back from the car, and the next I saw him fall. That is all."

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It is shown that the hand car was shoved forward by the collision between it and the train, and the deceased was under the hand car when the train stopped.

William Wren says: "When the train struck the hand car they had got the wheels parallel with the rails with 'two wheels inside the track and two outside.' I saw him fall but did not see him struck. He fell across the rail * * * and the car struck him and drug him down, but did not pass over his body. It drug him ten feet. It rather slipped upon him and shoved him along."

He was mortally hurt, and in intense pain and agony. From the injuries so received he afterwards died. They brought a train down and carried him into the cars to take him home. While aboard the train Shay, the special policeman, sent two or three men into the car to obtain admissions from him. Among these was a constable named Graham, who was a by-stander. Graham said: "I do not think you are badly hurt." The suffering man answered, "he did not think he could live." Graham then, in the presence of conductor Bush, inquired of him as to who was to blame, saying: "Do you blame anybody?" To which he answered: "I don't; it was all my fault; I do not blame any of the boys at all for this." "He said he wanted to save the hand car, to keep it from being mashed up. He was in fear of being discharged for neglecting his own duty." Parr went to see him the next morning. McCaffrey was asleep, and under the influence of morphine. After a while he roused up, and Parr, who seems to have been there to talk to him, says that in the course of a conversation he said to McCaffrey: "I am mighty sorry for it," to which he replied, "I don't blame you at all." The widow, who was present on this occasion, denies that any such statement was made. After Bush, the conductor, had returned from supper and talked with McCaffrey and others on the car,

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he sent a dispatch to the superintendent, which, on cross-examination, he admitted was substantially as follows (being an accident report filled up):

“NEW ALBANY STATION, April 28, 1885.

“*To Superintendent:*

“First section 27. Train northward. Engine 822. Engineer, John Parr. Conductor, C. G. Bush. Place and time, 5:40 p. m., main track, alley between Bank and Pearl. What caused it? Putting hand car on track and backed up, and putting hand car out of way, got caught between hand car and track. Name, Richard McCaffrey. Flesh wound on right side. Two ribs on side. Three cars next to engine. Nature accident: Putting car on track when train backed up, tried to get away, fell and train pushed hand car on him.

“(Signed) C. G. BUSH.”

This statement was made just after the accident, when the transaction, as observed, was fresh in the minds of the actors and bystanders, and is the only one in the record showing clearly how McCaffrey happened to receive his injuries.

It is true Bush was not an eye witness to what transpired. It is likewise true that it was made after Bush had seen Brooks, the brakeman, who was standing at the switch when the event happened. As the appellant failed to bring him, as a witness, to the trial, although in its employ, running between Louisville and Indianapolis at the time on a passenger train, it is fair to infer that he saw the accident, and would have testified to the facts contained in the despatch herein set forth. On these facts we can not say that McCaffrey was incautious. A trusty servant, he made an effort to save the hand car then in his care; seeing they could not, the crew abandoned it to save their lives, when, in the language of the despatch, he “tried to get away, fell, and the train

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pushed the hand car on him." This clearly establishes that he was not guilty of negligently permitting himself to be run over. In a sudden crisis, coming on one by surprise, it is not expected that a person in the midst of such peril will exercise that deliberate judgment which knowledge and proper time for reflection afford. Moved by a high sense of duty to serve his master, the servant may be impelled to an effort to save its property, when a stranger would escape. But the most prudent and active men may accidentally fall, especially when the mind and sight are turned to an unexpected danger, and no opportunity is given for care where or how to step. If one acts naturally in a case of sudden and instant peril put on him by another, and is injured, he is not guilty of negligence, although afterwards, out of the presence of danger, with time to reflect, and in the light of all the known facts, it may appear that another course of conduct might have led to an escape. *Knapp v. Sioux City, etc., R. W. Co.*, 32 N. W. Rep. 18; *Moak's Underhill on Torts*, pp. 283, 284; *Twomley v. Central Park, etc., R. R. Co.*, 25 Am. Rep. 162, and note.

In view of the official report made by the conductor on that fatal day, we need not disturb the judgment of the lower court on the ground that McCaffrey recklessly sacrificed his life in order to save the hand car and keep his place.

It is true McCaffrey knew the engineer and conductor were compelled by hunger to leave the train at times and run home to get something to eat. But there is no proof that he knew they had left the train on this afternoon. It was running back and forth continuously, from morning until night.

As we understand the logic of the accomplished counsel for the appellant, it is as follows:

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1. McCaffrey was a section boss, and the train crew were fellow-servants.

2. The absence of the conductor and engineer was the proximate cause of McCaffrey's death.

3. That both the appellant and McCaffrey knew, before the fatal day, that the conductor and engineer habitually left the train at times during the nineteen hours of constant duty to get something to eat; that this was in violation of the rules of the company, and in disregard of their duty under the law.

4. That having this knowledge, he was bound to abandon the service or take upon himself the risks incident to operating a train with a deficient crew while part were at their meals.

The four propositions involved in his position, counsel tersely states as follows:

"Moreover the evidence, so far from showing that McCaffrey did not have knowledge of the offending habits of his fellow-servants, discloses that he did, in fact, have knowledge, and no excuse is shown for his thereafter remaining in the service."

We think the doctrine of fellowship between trainmen and trackmen so well settled in this State that a citation of authorities to support it is unnecessary. In this case appellant's counsel frankly admits that his company had, at least, "constructive notice," that the engineer and conductor were "in the habit of leaving their trains to get their meals."

It is a recognized rule of the courts that if the negligence of a master combines with negligence of a fellow-servant, and the two contribute to the injury of another servant, the master is liable. *Franklin, Admr., etc., v. Winona, etc., R. R. Co.*, 34 N. W. Rep. 898; *Elmer v. Locke*, 135 Mass. 575; *Grand Trunk R. W. Co. v. Cummings*, 106 U. S. 700; *Coppins v. New York Central, etc.,*

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R. R. Co., 122 N. Y. 557; *Whittaker v. President, etc., Co.*, 126 N. Y. 544; *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210 (223); *Rogers v. Leyden*, 127 Ind. 50 (53).

In *Boyce v. Fitzpatrick*, 80 Ind. 526, it is said: "While a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, so that he will not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer, and where, in the absence of such care and precaution, an employe is injured, the employer is liable, although the negligence of a fellow-servant contributed to the injury complained of." This principle was approved in *Louisville, etc., R. W. Co. v. Berkey*, 136 Ind. 181.

In our opinion the rule is a just and salutary one, and we ought not depart from it. Unless it be that a master has a right to require a servant to stand at his post of duty without food or rest for nineteen consecutive hours every day, Sundays included, and that such conduct is not a breach of duty to the public, as well as its other servants, it follows that the appellant, in this case, has not performed its duty towards decedent, without which it is liable, if this negligence was the proximate cause of his death. That it was, is clear. The law of nature is inexorable in its demands. The cravings of hunger must be appeased. The laws of humanity declare that every man, fit to be a member of a train crew, must have three meals, some rest, and eight hours' sleep a day.

The appellee well says: "Deprived of these requisites of intelligent life, a soldier becomes a coward, a workman a drone." Any being would lose his strength if worked a few months by the time schedule provided for this crew. Every statute and employer's rule is

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made in the presence of and subject to the laws of nature. Hunger, thirst, and sleep are imperative; and when a schedule is made of nineteen consecutive hours of service on a train, and no provision is made by the company for their supply of food, it is understood that the employes must, of necessity at times during the service, leave their places to get their meals. So that when the engineer and conductor left the train, after thirteen hours' service on the day of the accident, to get their suppers, it was in obedience to this law of nature—an overruling necessity, and was not, therefore, negligence on their part. They were not deserters, and their conduct can not be characterized as "offending habits." Without notice to the company, it was bound to know that these men must, and therefore did, at intervals during the nineteen hours of each day, leave the train to answer nature's strong and eager desire for food. And so knowing, it will be held to have consented. If appellant desired to escape responsibility, it should have provided an adequate force.

"It is the duty of the railway not to increase the perils of its servants by the inadequacy of the force employed in any particular work; and, in particular, trains must be manned by a sufficient number of train hands." *Patterson's Railway Accident Laws*, section 297; *Flike, Admr., v. Boston, etc., R. R. Co.*, 53 N. Y. 549; *Booth v. Boston, etc., R. R. Co.*, 73 N. Y. 38; *Moak's Underhill on Torts*, 47.

We think it clear that the appellant was guilty of a breach of duty toward the public, including McCaffrey, by operating the train with only a fireman and a brakeman, because it was its duty to have an adequate number of competent men on the train to handle it and give notice of its approach. And when, by appellant's conduct, it became necessary for its two chief employes to

temporarily absent themselves, it was its duty, at once, to stop the train until their return, or supply their places with other competent men during their enforced and necessary absence. This legal duty is supported by several rules printed on the time card.

Rule 40 provides that the whistle is to be sounded three times when a standing train is to move backward. Rule 40 provides that before starting, the bell must be rung.

Rule 110 reads as follows: "When a train is run backward (except when shifting and making up trains in yards), a signalman must be stationed in a conspicuous position on the rear car, so as to perceive the first sign of danger, and immediately signal to engineman."

The evidence shows that all these rules were violated by the company at the time of the accident.

Impliedly conceding all these facts, the appellant seeks to escape responsibility, by urging that McCaffrey negligently contributed to his own death. If this were true, the general verdict of the jury to the contrary should be set aside. No difference how derelict of duty the company was, if McCaffrey saw or knew the train was backing on him, and going beyond him, he was bound to exercise the caution which the law imposes on every man to take care of himself, even at the risk of losing his position. But as there is evidence in the record strongly tending to establish that he was "stepping back from the car," and "tried to get out of the way," fell, and the "train pushed" the "hand car on him" at the time the calamity befell him, we are not prepared to say that the jury falsified the facts when they found he was not guilty of negligence contributing to the result. Complaint is made that the court refused to give the jury the 16th and 17th instructions asked by defendant. The 16th states the proposition that if McCaffrey knew the engineer and conductor were in the habit of absent-

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ing themselves from the train, at times, to get necessary food, then it was McCaffrey's bounden duty to know they were on this train at that time, "and not to place, or attempt to place, the hand car on the track if they were absent, and if he failed in this respect he was negligent." This would have imposed upon him the duty to board the train as it passed, and see if the conductor was on. And as it is negligence to get on a running train, he would have been compelled to have followed the train to the station, in case it did not stop long enough for him to overtake it, and make the inspection. On the same principle he would have been required to see if the fireman was eating his supper on the engine. We are not aware of any rule casting such a burden on the section boss. In the *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88 (94), this court said: "The obligation or duty of the master is not to expose the servants, while conducting his business to perils or hazards which might have been provided against by the exercise of due care and proper diligence on the part of the master." In Patterson's *Railway Accident Laws*, *supra*, section 283, it is declared that a railway company "is bound to its servants to exercise * * * that degree of care which will tend to secure its servant's safety to as great an extent as is compatible with the conduct of an essentially hazardous business by the use of human instrumentalities." As to the 17th instruction, there was no evidence tending to show that "McCaffrey saw the backing train approaching him in time, and with opportunity, to get out of the way, and failed to do so." The fact is, while trying to get out of the way he fell, and was then struck, dragged and injured. In *Rice on Ev.*, volume 2, p. 796, it is said: "No instructions should be given, which are not relevant to facts which there is evidence tending to prove." By another instruction the appellant asked the court to

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charge the jury that if McCaffrey knew that the conductor and engineer were in the habit of leaving the train to get necessary food, "he was bound to report such facts to the company," or he could not recover. This contention is in the face of the fact that the company was bound to know, and did know of this "habit," and it is confessed by the learned counsel for the appellant in his ably written brief. Appellant complains of the rulings of the lower court on the pleadings, and contends that neither paragraph of the complaint states facts to constitute a cause of action. The complaint, it appears, was copied almost literally from the pleading set out in full in the case of the *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261, which was held sufficient. Each paragraph of the complaint in this action shows that McCaffrey was killed by the appellant company moving a train back on him without signals or guards, or any one except a fireman in charge of it, and that he was free from fault. This is enough. *Board, etc., v. Legg, Admr.*, 110 Ind. 479; *Wabash R. W. Co. v. McDaniels*, 107 U. S. 454; *Atchison, etc., R. R. Co. v. Moore*, 15 Am. & Eng. R. R. Cases, 312, section 284, R. S. 1881; *Tennessee, etc., R. R. Co. v. Roddy*, 5 S. W. Rep. 286; *Bolinger, Admr., v. St. Paul, etc., R. R. Co.*, 31 N. W. Rep. 856; *Sherlock v. Alling, Admr.*, 44 Ind. 184.

The deceased is admitted, and was shown, to have been a man of intelligence, strength, and integrity, of the age of 41 years. He had been promoted, and under the rules was "in the line of promotion dependent upon the faithful discharge of duty, and capacity for assuming increased responsibilities." The damages are not excessive for the loss of such a man. In our opinion the cause was fairly tried.

The judgment is affirmed.

Filed Sept. 20, 1894; petition for a rehearing overruled Dec. 18, 1894.

The Lebanon Light, Heat and Power Company *et al.* v. Leap.

No. 16,449.

THE LEBANON LIGHT, HEAT AND POWER COMPANY ET
AL. v. LEAP.

189	443
139	477
139	443
144	359

NEGLIGENCE.—*Natural Gas.*—*Laying Pipe Line Loose Upon Public Highway.*—*High Pressure of Gas.*—*Pipes Poorly Jointed.*—Where it is charged and established that the defendants laid a three-inch natural gas pipe loose upon the public highway, and transported through such pipe natural gas at the dangerous pressure of three hundred pounds to the square inch, the pipe being poorly jointed, and permitting gas to escape therefrom, negligence on the part of the defendants is sufficiently shown.

SAME.—*Joint Tort Feasors.*—*Parties to Action.*—*Natural Gas.*—*Pipe Line.*—*Personal Injury.*—*Explosion.*—Where the gas wells were drilled by a sub-contractor, the pipes being furnished by the contractor and put together by the sub-contractor, and after the sub-contractor had ceased to use the pipes and gas for drilling purposes, the agents of the contractor took up the north and south line, which connected with the east and west line, leaving one joint connected with the T, after which the accident happened, the pipe line being then solely the property of the contractor, he must thereafter be held to have assumed the sub-contractor's former charge of caring for the pipe, which, after the accident, was used as a part of a permanent line. And where, before the accident, gas was delivered to the company by the contractor, partly through the pipe line in question, the company, as well as the contractor, is liable, notwithstanding the fact that the contractor had not, at the time of the accident, fully completed his contract, nor formally turned over the plant to the company, which was in actual use of gas which flowed through the pipe in question.

CONTRIBUTORY NEGLIGENCE.—*Natural Gas.*—*Pipe Line.*—*Explosion.*—*Highway.*—Where it appears that at the time the accident occurred, the plaintiff, a boy eighteen years of age, was passing by the crossing of the highways and stopped to look at the burning gas escaping from defendants' pipe line in the highway, unaware of his danger, and that without any act or suggestion of his, but solely by the act of another, and because of the negligence of defendants, the gas exploded, causing plaintiff's injury, the plaintiff was not guilty of contributory negligence.

SAME.—*Erroneous Instruction.*—*Natural Gas.*—*Explosion.*—*Plaintiff's Intermeddling at Previous Times.*—Where, in such case, the court instructed the jury that "Anything any other person may have done

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then and there, or at any other time, independently of himself, and for which he (the plaintiff) was not responsible, or anything he may have done himself at any other time or place in way of intermeddling with any of the gas wells or pipe lines of said defendants, or either of them, if either of such acts have been proven, would not affect the right of the plaintiff to recover,"—the instruction is too broad, the effect of the instruction being to exclude from the consideration of the jury all former acts of the plaintiff in connection with the wells or the pipe line, and confine their attention strictly to his actions at the time and place of the accident, and was, therefore, erroneous.

From the Hamilton Circuit Court.

G. Shirts, I. A. Kilbourne, T. J. Terhune, E. P. Schlater and J. L. Shelton, for appellants.

T. J. Kane, for appellee.

HOWARD, J.—The Lebanon Light, Heat and Power Company entered into a contract with its coappellant, Charles T. Doxey, according to which the said Doxey was to construct a natural gas plant for the appellant company.

The terms of this contract do not appear from the record.

The appellant Doxey also entered into a contract with his coappellant, John E. Snow, according to the terms of which the said Snow was to drill four gas wells in Hamilton county to supply gas for said gas plant. The wells were to be drilled at such points as Doxey should direct. Snow was to receive six hundred and twenty-five dollars for each well, and was himself to do all the work and furnish all labor, also fuel for the first well. He was to have the privilege of using gas from the first well or wells for drilling purposes. He was to pipe such gas at his own expense, except that Doxey was to furnish him the necessary pipes and fittings.

The four wells were located near the crossing of two highways. The first well was situated near the east and

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west highway, and about half a mile west of the crossing. Doxey located well number two near the north and south highway, and about three quarters of a mile north of the crossing. In like manner well number three was located by Doxey, near the east and west highway, and about half a mile east of the crossing. Well number four was not near the highway, but was located about a mile north of well number one.

After drilling well number one, and when well number two was located, Snow laid a two-inch supply pipe on the top of the ground, along the north side of the highway, from well number one east to the crossing, where he put in a T, and thence continued the pipe along the west side of the highway north to well number two.

After well number two was drilled, and well number three located, Snow continued the pipe line from the T at the crossing, east along the north side of the highway to well number three.

At the time of the accident, wells one, two and three had been drilled. The accident occurred September 20, 1890, about two weeks after the completion of well number three. Snow was then engaged at number four, away from either highway.

Soon after well number three had been completed, Doxey's men took up the pipe on the north and south highway, from the T at the crossing north to well number two.

There was then no gas in the pipe at the crossing. Snow was getting his gas from wells one and two, for use in drilling number four; and it does not appear that he had anything further to do with well number three or with the pipe on the highway.

Doxey's assistant testifies that he began taking up the pipe north from the crossing by cutting the second joint

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north of the T. They then took two pairs of tongs, one to hold the first joint in place and keep it from turning in the T, while the other tongs were used to unscrew the piece of the second joint which had been cut off. They then plugged up the end of the first joint with a two-inch wooden plug, and went on and took up the rest of the pipe north to well number two.

When cutting the second joint and unscrewing the piece from the first joint, and plugging the end of the latter, they did not examine the T to see if the joint of pipe was tight in it; but it seemed tight. There was no gas on that line at the time.

The T was cast-iron, and of heavier make than the pipe; it would weigh about twenty-five pounds. The joint of pipe left attached to it was about nineteen feet long. It was about twelve feet from the nearest fence.

It does not appear how soon after the taking up of the pipe north of the T that the gas was again turned on, nor does it appear who turned it on, nor for what purpose or use it was turned on. Snow, as we have seen, had not used gas through this line since his completion of well number three, which was about two weeks previous to the accident.

It does appear, however, from the testimony of Frank K. Pierce, an employe of the appellant Doxey, and superintendent of construction of the permanent line to Lebanon, that that line was completed into the city of Lebanon, and gas furnished to the city, in the month of August, 1890, the month previous to the date of the accident.

But for whatever purpose the gas was turned into the pipe between wells one and three after the taking up of the pipe north of the T, it is certain that between that time and the time of the accident the leak of gas at the T was observed frequently. It also seems very probable

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that the leak was noticed before the taking up of the pipe; but of this the evidence is not so marked, while it is clear that the leak grew worse from time to time up to the date of the accident.

The appellee was at the time about eighteen years of age, and lived with his father about forty rods south of the crossing.

Several persons testified that they saw gas on fire at the leak in the T on the day of the accident, and at other times previous. John Griffin, who lived near the crossing and who was the father of Warren Griffin, another boy who was hurt at the accident, testified that there had been a leak at the T to some extent ever since the pipe had been laid, and that the leak had been quite bad for some length of time previous to the accident.

Others who had passed there frequently had never noticed the leak before that day. Some had smelled gas for a few days previously, but saw no fire.

John Leap, father of the appellee, had seen it on fire about two weeks before, and had put out the fire with a bucket of water, but had not seen it burning on any other occasion.

The appellee himself testified that he had noticed the leak on fire about two months before the accident, and at different times all along up to the time of the accident. The last time previous he had seen it on fire was on the preceding Monday night; the accident happened on Saturday. On that Monday night, he says, there was a charivari party out, and they stopped for a while near the leak, and some one set it afire. It burned for five minutes or less, when they put it out and went home. He did not touch the pipe or set the gas afire himself; he saw two of the party lift up the end of the link of pipe about four feet, and then let it down again. Appellee next saw the leak afire on the Saturday of the ac-

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cident, about ten o'clock in the morning; the blaze was then three or four feet high when he came up to it. The pipe at the T and across the traveled part of the road was covered with about an inch or two of earth; it had been so covered when first laid.

He again saw the leak between one and two o'clock that afternoon. He was on his way afoot to Sheridan, a town about a mile north of the crossing. When he came up to the fire, he saw Warren Griffin, a boy about twelve years of age, standing there. He began talking to Warren about the nice time they had at the charivari. He noticed Warren with a small stick, scraping along the dirt where the fire was burning. While they were standing there a neighbor came along with a team going to Sheridan and asked appellee to go along, but he said he was not quite ready. Another neighbor, Mr. Raridan, passed along a minute or two later and made some remark about the fire.

The two boys were standing without talking during this time, when, appellee testifies, he said to Warren: "If that plug was taken out of that pipe it would make a nice fire; he asked what plug, and I went around and pointed to the plug * * * the plug in the north end of the pipe. * * * He walked around to the end of the pipe, and raised the end of the pipe up, somewhere about three inches, and that was the last I knew."

The explosion followed, the joint of pipe being thrown out and the two boys thrown violently back and burned by the gas.

On cross-examination, the appellee testified that he had seen the wells put down, and saw the gas burning at the wells, and knew that it had been turned into the pipe. He had stopped at the crossing a great many times since the pipe was put down. Quite a crowd of boys and girls used to assemble there Sunday evenings.

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He never lit the gas or interfered with the pipe himself. He saw the link of pipe lifted up by boys several times, sometimes when the leak was afire; they just raised it up and then let it down. On the night of the charivari, when the gas was lit and two persons lifted up the joint of pipe, he heard his father say: "Boys, I would not do that," and they laid it down. At the time of the accident he told Warren, "if the plug was took out and it was lifted up it would make a nice fire." The earth which Warren was scratching with a stick was burned red, like tile. Warren turned to look at the fire just as he raised the pipe; appellee did not touch the pipe.

Warren Griffin testified that he was at the crossing with his brother before noon on the day of the accident for about five minutes. The blaze at the leak was then about six feet high.

He went down again alone after dinner. Just after he got there the appellee came along, going to town. He had not seen the appellee since the Sunday before, and did not expect him then. They had been there about five minutes before the explosion. They were standing near the end of the link. Appellee said: "If the plug was out of the end of the pipe, and the pipe was raised up, it would make a nice fire. I said 'what plug?' and he showed me, and I lifted the pipe up a little, * * * about three inches." Appellee did not have hold of it.

Thomas W. Raridan, one of the neighbors who passed while the boys were standing near the pipe, testified that after he passed them, going north, he looked back and saw the smaller boy stoop, as if he were about to lift something up. The other boy was standing near by, but not in a stooping position. Just then the explosion took place.

We think that no other evidence given, substantially

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changes the facts as we have set them out from the record.

The questions for decision are as to the negligence of the appellants and the contributory negligence of the appellee.

The material parts of the complaint, as presenting the issues on the question of negligence, are the following:

That the appellee was, on and prior to September 20, 1890, "a strong, active, intelligent and energetic young man eighteen years of age, in good health and in full possession of all his faculties, and with good prospects for a long, successful and profitable life."

That "said defendants, a short time prior to the date hereinbefore stated, negligently constructed a gas pipe line along and in the highway * * *, for the purpose of conveying and transporting natural gas through said line, and that said line so constructed as aforesaid was in use and operation by said defendants on said date.

"That said line was made of pipe three inches in diameter, screwed together and negligently laid on top of the ground in said highway. * * * Said defendants negligently and imperfectly and partially screwed one end of the joint of pipe, perhaps twenty feet in length, into said pipe running east and west.

"That said joint of pipe was negligently, loosely and imperfectly inserted and screwed into said pipe line, as aforesaid, in such an insecure and imperfect manner that it was liable at any moment to become disconnected from said line; that the north end of said joint of pipe was plugged and the south end was, as before stated, imperfectly and carelessly inserted into the pipe line as aforesaid.

"That natural gas was, at the time herein mentioned, being negligently conducted by said defendants through

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said pipe line, at the high and dangerous pressure of more than three hundred pounds to the square inch.

"That at the place of intersection of said joint of pipe with said line, the gas was, on account of said deficiencies and imperfections, constantly escaping, and was frequently on fire, and that the said line and the said joint of pipe aforesaid were unprotected and unguarded.

"That on the said 20th day of September, 1890, the plaintiff, who was a young man eighteen years old, as aforesaid, and who was passing by said public road crossing and said pipe line, as aforesaid, and who stopped to look at said escaping and burning gas, and had but little knowledge and comprehension of the dangers of handling, using, and transporting natural gas, was in said highway, at or near the point where this joint of pipe intersected with said line, and was at or near the north end of said pipe, and was standing there looking at said escaping and burning gas, and that without fault or want of care on his part, and on account of said negligence and carelessness of said defendants, the said joint of pipe was blown out of said line, and the fire and escaping gas from said line, through said opening, instantly caused a terrible explosion, the flames of said escaping and burning gas, on account thereof, extending to and beyond the plaintiff, who, at the time, was at or near the north end of said joint of pipe, completely enveloping him; and that on account of said explosion and burning gas the said plaintiff was violently thrown a distance of many feet, and his clothing was burned and he was so deeply, seriously, and terribly burned, etc.

"That all of his said injuries were sustained as a result of the said negligence and carelessness of said defendants, and without fault on his part."

This complaint charges, in substance, that the appellants were guilty of negligence in laying a natural gas

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pipe, as described, upon the public highway, and in transporting through such pipe, as so constructed, natural gas at the dangerous pressure of three hundred pounds to the square inch. We think the charge is fully sustained by the evidence.

That the pipe was carelessly put together is evident from the numerous leaks, in addition to the one at the crossing, which are testified to. It was additional negligence to lay such a poorly jointed pipe, containing such a dangerous explosive, loose upon the ground, where the public, including children and other inexperienced persons, were passing day after day. Besides all this, it was a violation of the law to lay pipe upon the public highway. Whatever may be said as to the right to lay gas pipe, or other pipe, in covered trenches along the highway, after due permission obtained from proper authority, and so laid as not in any manner to obstruct the highway or endanger public travel, there can be no question that it is unlawful to occupy the surface of the highway as done in this case. The public roads, free from any obstructions to travel, are solely, and from fence to fence, for the use of the traveling public. *Ohio, etc., R. W. Co. v. Trowbridge*, 126 Ind. 391; *Elliott Roads and Streets*, chapter 24.

And we think that the jury were fully authorized, from the evidence, in finding, as they did by their general verdict, that this negligence attached to all the appellants.

Snow actually put the pipe together and laid it in the highway. Doxey furnished him with the pipe and the fittings and located the several wells; and his agents took up the north and south line, cutting and unscrewing the second joint from the first at the crossing. The accident happened after this, and after Snow had ceased to use the pipe, which then belonged solely to Doxey. Doxey

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thereafter must be held to have assumed Snow's former charge of caring for the pipe; and he did, in fact, afterwards bury this line of pipe in the highway, using it as a part of the permanent line to Lebanon.

And from the fact that, a month before the accident, gas was delivered to the city of Lebanon from well number one, which, by the pipe passing the crossing, was directly connected with well number three, the jury were amply justified in finding that the gas flowing through this pipe from well number three was taken along with the gas from number one, to be distributed by the appellant company to its patrons in the city.

It does not appear from the evidence, that any other use could be made of the gas; for Snow had ceased to use it before the north and south line was taken up, and two weeks before the date of the accident.

If this inference of the jury, that the company was in the actual use of the gas that flowed over the crossing at the date of the accident, were incorrect, it was the duty of the appellant company to show that fact, and, by introducing upon the trial its contract with Doxey, or by other competent evidence to prove the absence of liability on its part. The evidence adduced makes a *prima facie* case against the company.

As said by Mr. Broom, Legal Max. 939, "Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him."

Notwithstanding, therefore, the fact that Doxey had not at the time fully completed his contract, nor formally turned over the plant to the company, yet the company, being in the actual use of the gas which flowed through the pipe over the crossing, can not escape liability for the negligent manner in which the gas was

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conveyed through the pipe thus carelessly constructed along the public highway.

The other question, as to the liability of the appellee, and whether he was himself guilty of negligence contributing to his injury, is one not free from difficulty.

In the complaint it is alleged that "plaintiff was on and prior to the 20th day of September, 1890, a strong, active, intelligent and energetic young man, eighteen years of age, in good health, and in full possession of all his faculties."

It is further alleged, "that on the said 20th day of September, 1890, the plaintiff, who was a young man eighteen years old, as aforesaid, and who was passing by said public road crossing, and said pipe line, as aforesaid, and who stopped to look at said escaping and burning gas, and had but little knowledge and comprehension of the dangers of handling, using, and transporting natural gas, was in said highway at or near the point where this joint of pipe intersected with said line, and was at or near the north end of said pipe, and was standing there looking at said escaping and burning gas, and that without fault or want of care on his part, and on account of said negligence and carelessness of said defendants, the said joint of pipe was blown out, etc.," causing the injury complained of.

While, therefore, the appellee was in the full possession of his strength and faculties, it does not appear from these allegations that on the occasion of his injury he was himself guilty of any negligence. He was at the time on the public highway, where he had a right to be. Whether he walked, or rode in a wagon at the invitation of his neighbor, or whether he stood talking with an acquaintance and watching the gas pipe or any other object, was an affair that concerned himself alone, so long as he did not interfere with the equal right of

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any one else to use the highway. Least of all have the appellants, who had placed an unlawful obstruction upon the highway, a right to complain of his presence.

If, however, it should appear that the appellee were aware of the dangerous character of the obstruction thus placed upon the highway, and notwithstanding such knowledge, should persist in standing in the immediate presence of the danger, and, still more, if he should, in any manner, either by his own act or by suggestion to another, have aided in liberating the dangerous explosive, he could not recover for an injury thus brought about.

It appears from the evidence, that the appellee lived near the crossing, and within a mile of the town of Sheridan, for fifteen years prior to the accident; and that for four or five years previous to that time gas wells were put down in and around that town. The appellee had been present a few times at the drilling of the first well in Sheridan, also when they fired the second well. He also knew of the use of gas for fuel in Sheridan, Noblesville, and other points in Hamilton county, prior to the drilling of the wells for the Lebanon Company. He was also present at the drilling and firing of these wells, and knew that gas was piped around from well number one to well number two. He saw the size of the flames from the wells and heard the noise. He had been warned by his father not to light the gas at any of the leaks. Parties of young people with whom he joined had been in the habit, particularly on Sunday evenings, of congregating at the crossing, lighting the gas, and watching it burn. Appellee says he did not himself light the gas or touch the pipe. On these occasions he saw the end of the joint of pipe raised up and let down several times, sometimes when the gas was lit and sometimes when it was not.

On the Monday night previous to the accident, he and

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his father were with the charivari party at the crossing. He saw the gas lit and the pipe raised up that evening. The fire blazed up two feet or more. He heard his father say at the time, "Boys, I would not do that," and they laid the pipe down.

On the day of the accident, when talking to the boy Griffin, he said to him: "If the plug was took out and it was lifted up it would make a nice fire." On that occasion he noticed the fire stronger than usual, and that the earth near it was burned red, like tile. When he told Griffin about taking out the plug and lifting up the pipe, Griffin said, what plug? and they both walked around to the end of the pipe and he showed Griffin the plug, when Griffin stooped down and lifted up the pipe. Appellee was then standing on one side of the pipe and Griffin on the other, and appellee noticed Griffin turn to look at the fire as he raised the pipe; appellee, at the same time, observed the fire himself. Then the explosion took place.

The appellee does not appear, at the time, to have himself touched the pipe; and, for this reason, perhaps, the jury did not think that he was guilty of contributory negligence. Considering the evidence adduced, it seems very doubtful whether this conclusion was correct.

As bearing on this question, the following, with other instructions given the jury, is complained of:

"7th. On the subject of contributory negligence, the question for your consideration is, whether the plaintiff himself was in fault in any act he did or caused to be done at the time of the accident, if any such act has been proved, which contributed to the injuries sustained by him. Anything any other persons may have done then and there or at any other time independently of himself and for which he was not responsible, or anything he may have done himself at any other time or place in

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way of intermeddling with any of the gas wells or pipe lines of said defendants or either of them, if any such acts have been proven, would not affect the right of the plaintiff to recover in this action, unless he was in fault at the time and place when the accident occurred in doing something which contributed to his own injuries."

This seems too broad. From it the jury were given to understand that anything which the appellee might have done before the date of the accident could not be taken into account. His experience as to the dangerous nature of natural gas, the admonition of his father not to light the leaks, and warning the boys of the charivari party to let the pipe alone, were matters of knowledge which would certainly affect his responsibility on the day of the accident, even though drawn from events that occurred on former occasions. Still more questionable is the clause of the instruction that "anything he may have done himself at any other time or place in way of intermeddling with any of the gas wells or pipe lines * * * would not affect the right of the plaintiff to recover."

It was charged as a part of the defense that the working up and down of the joint of pipe on the night of the charivari, and at other times, had so loosened the joint at the T that when, at the suggestion of appellee, Griffin lifted it up at the time of the injury, the loosened and weakened joint suddenly gave way, when but for the disturbances on former occasions it might have withstood the weakening caused by Griffin's raising it up. Whatever may have been the facts as to this, the appellants had a right to make such proof as they were able, and if, in fact, appellee himself, by his own act, or by participating in the acts of others, either on the occasion of the charivari or at other times, had in any degree caused the loosening or weakening of the joint, and so helped to bring the injury upon himself, he ought not

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to recover. The effect of the instruction was to exclude from the consideration of the jury all former acts of the appellee in connection with the wells or the pipe line, and to confine their attention strictly to his actions at the time and place of the accident.

We do not think that the error in this instruction is cured in any other instructions given, if, indeed, it could be cured by other instructions. The all important question, after the establishment of the negligence of appellants, is whether the appellee was or was not negligent, and we do not think that his negligence or want of negligence is to be measured solely by what he did on the occasion of his injury.

The error was probably an inadvertence on the part of the learned and accomplished trial judge, but we think it was, nevertheless, calculated to lead the jury away from the consideration of important evidence in the case, and therefore that a new trial ought to be granted. Other alleged errors discussed by counsel need not, as we think, be considered.

The judgment is reversed, with instructions to grant a new trial.

Filed Nov. 27, 1894.

No. 17,065.

LEVI ET AL. v. DRUDGE ET AL.

SUPREME COURT PRACTICE.—*Reversal of Judgment.*—*Prejudicial Error.*—*Harmless Error.*—*Striking Out Paragraphs of Answer.*—To authorize a reversal of the judgment it is necessary not only that the appellant should show that the court erred, but he must show that the error was of such a character that it probably injured him. The error, if any, in striking out a paragraph of answer is harmless

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where the special finding shows that the facts averred therein did not exist; and the same is true of a paragraph stricken out, where the material averments thereof are contained in another paragraph upon which issue is joined.

From the Fulton Circuit Court.

E. Myers, G. W. Holman, R. C. Stephenson, M. L. Essick, O. F. Montgomery and J. H. Bibler, for appellants.

J. Rowley, M. A. Baker, I. Conner and W. W. McMahon, for appellees.

COFFEY, C. J.—This was an action by the appellee, Jeremiah Drudge, in the Fulton Circuit Court, against the appellants, Theresa Levi, Joseph Levi and James Sanns, to recover the amount alleged to be due on two several promissory notes executed by them to Wilhelm Blohm, and to foreclose a mortgage on certain described real estate in Fulton county to secure the same.

The appellants filed an answer in five paragraphs, and also a cross-complaint against the appellees, Jeremiah Drudge and Julius Rawley.

The court, on motion, struck out the third and fifth paragraphs of the answer, and the appellants excepted. Upon issues found on the remaining answers and the cross-complaint, the cause was tried by a jury, resulting in a special verdict, upon which the court rendered judgment in favor of the appellee Drudge.

The material facts in the case, as they appear by the special verdict, are that on the 2d day of July, 1888, the appellants, Theresa Levi, Joseph Levi and James Sanns purchased of Wilhelm Blohm the land described in the complaint, and executed the notes and mortgage in suit to secure part of the purchase-price.

At the time Sanns executed the notes and mortgage, he was under twenty-one years of age. Before either of the notes became due, Blohm died intestate, and one

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Davis was appointed administrator of his estate. By order of the proper court, the administrator sold and assigned the notes and mortgage to the appellee Drudge. Julius Rawley subsequently purchased the land described in the complaint, and, as a part of the purchase-price, verbally assumed and agreed to pay the notes and mortgage in suit, and by his direction the appellants, Theresa Levi, Joseph Levi and James Sanns conveyed the land to Willis McHenry. McHenry subsequently conveyed the land to Cora R. Bouck, but neither of these parties paid any consideration for such conveyances, the same having been made at the request of Rawley.

It is claimed by the appellants that the circuit court erred:

First. In striking out the third and fifth paragraphs of their answer.

Second. That the court erred in overruling the motion of appellants for judgment in their favor on the special verdict.

Third. That the circuit court erred in overruling the motion of the appellants to modify the judgment.

As to the first error alleged, it may be remarked that it appears by the special verdict of the jury that the facts averred in the third paragraph of the answer did not, in fact, exist.

The appellants were not, therefore, injured by the ruling of the court in striking out that paragraph of their answer. To authorize a reversal of the judgment, it is necessary not only that the appellants should show that the court erred, but they must go one step further and show that the error was of such a character as that it probably injured them. Here it affirmatively appears that they were not injured by the ruling of which they complain.

All the material averments found in the fifth para-

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graph of the answer were contained in the fourth paragraph, upon which issue was joined. The appellants were not, therefore, injured by striking out the fifth paragraph.

The appellants were not entitled to judgment in their favor on the special verdict of the jury, but, on the contrary, it fully justified, we think, the action of the court in rendering judgment in favor of the appellees.

After the rendition of the judgment in this case, the appellants Theresa Levi and Joseph Levi filed a motion praying the court to so modify the judgment as to render a personal judgment against Julius Rawley, as principal, and against them as sureties for the amount found due the appellee Drudge.

The court did not err in overruling this motion, for several reasons, chief among which was, that there was no issue in the case authorizing such a judgment. But if there had been such an issue, it may well be doubted as to whether the appellee Drudge could be delayed in the collection of his debt because his debtors could not agree as to which one was primarily liable.

There was no personal judgment rendered against Sanns, by reason of the fact that he was a minor at the time the notes in suit were executed.

There is no error in the record for which the judgment should be reversed, and the same is, for that reason, affirmed.

Filed Nov. 26, 1894

Thomas, Administrator, v. The Chicago and Erie Railway Company.

No. 17,043.

THOMAS, ADMINISTRATOR, v. THE CHICAGO AND ERIE
RAILWAY COMPANY.

APPEAL.—Interlocutory Order.—Sustaining Demurrer to Evidence.—No Appeal from.—The order of the trial court sustaining a demurrer to the evidence is a mere interlocutory order, and not a final judgment, and no appeal lies therefrom.

From the Huntington Circuit Court.

L. Mock, A. Simmons, C. W. Watkins, Z. T. Dungan
and *J. C. Branyan*, for appellant.

O. Gresham and J. B. Kenner, for appellee.

McCABE, J.—The appellant, as administrator of the estate of James L. Platt, deceased, sued the appellee, in the Wells Circuit Court, to recover \$10,000 damages to the widow and child of said decedent, caused by the alleged negligence of the appellee in causing the death of said decedent. The venue of the cause was changed to the Huntington Circuit Court where, upon the issues formed upon the complaint, there was a jury trial. At the close of the appellant's evidence the appellee demurred to the evidence. The evidence is all properly set out in the demurrer.

The circuit court sustained the demurrer to the evidence, and the appellant duly excepted and prayed an appeal to the Supreme Court, which was granted. There was no judgment of any kind rendered by the circuit court, though the appellant's learned counsel in their brief say that the appellee filed its demurrer to the evidence, which the court sustained, withdrew the cause from the jury, and rendered judgment for the defendant (appellee), from which judgment counsel say the plaintiff (appellant) appeals to this court. No such judgment is

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139	462
144	289
144	631
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found in the record. The ruling sustaining the demurrer to the evidence is assigned as the only error.

Appeals are only authorized by statute, from final judgments. 1 Burns R. S. 1894, section 644 (R. S. 1881, section 632). There are some exceptions to this general rule provided by the statute, where appeals are authorized from certain interlocutory orders, but the case before us does not fall within any of those exceptions. 1 Burns R. S. 1894, section 658 (R. S. 1881, section 646). To constitute a final judgment within the meaning of the statute so as to authorize an appeal, the order appealed from must make a final disposition of the cause. *Northcutt v. Buckles*, 60 Ind. 577; *Thiebaud v. Dufour*, 57 Ind. 589; *Taylor v. Board, etc.*, 120 Ind. 121; *State v. Spencer*, 92 Ind. 115; *State v. Evansville, etc., R. R. Co.*, 107 Ind. 581; *McGuire v. State*, 119 Ind. 499; *Champ v. Kendrick*, 130 Ind. 545.

An appeal can not be taken by persons when no judgment is rendered for or against such persons. *Jager v. Doherty*, 61 Ind. 528. Elliott App. Proced., sections 80, 81, 83. Here there was no judgment rendered for or against anybody, nor did the order sustaining the demurrer to the evidence make a final disposition of the cause. It was a mere interlocutory order liable to be changed before the final disposition of the cause. "The general rule," says Judge ELLIOTT, "that appeals lie only from final judgments is so essential to the orderly administration of justice, and has so much to commend it, that it is with reason that statutory provisions creating exceptions are construed with some strictness.

"The doctrine is that where a general rule exists, and a party asserts that his case forms an exception to the rule, he must show substantial grounds for his claim, or the case will be brought under the rule. This doctrine is applied with liberality to prevent appeals from

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intermediate rulings or interlocutory orders, for, in almost every form in which the question has been presented, the courts have exhibited their reluctance to multiply or recognize exceptions to the general rule. *

* * The object of the rule is to prevent the multiplication of appeals, and to require parties to submit a case once for all." Elliott App. Proceed., section 84. Hence, should we entertain this appeal, and reverse the interlocutory order, and remand the cause for further proceedings, it would become the duty of the trial court to make a finding, assess the damages, and render judgment thereon. From such judgment either party could appeal. Thus we should have two appeals in a cause where there had been but one trial thereof.

The same author, Judge ELLIOTT, further says in section 83, already cited, that "No order is final in such a sense as to constitute a final judgment unless it disposes of the main case so far as there is power in the trial court to decide upon the questions presented by the issues, no matter how clearly and decisively the order may indicate what the ultimate judgment will be. Until there is an ultimate judgment the case is not finally disposed of inasmuch as the trial court may change its rulings, award a *venire de novo*, grant a new trial, or make some such order, notwithstanding the fact that in other rulings it may have clearly manifested a purpose to carry its rulings into the ultimate judgment or decree. * * *

The rule that no matter how decisive may seem the ruling of the trial court it is not a final judgment, is well illustrated by the cases in which rulings were made denying a motion for judgment on a special verdict or on the answers of a jury to special interrogatories, for such a ruling is seemingly as clearly indicative of what the final judgment will be, as it is possible for any order

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to be, except, of course, the ultimate judgment itself." See *Indiana Improv. Co. v. Wagner*, 134 Ind. 698.

Here, also, the ruling on the demurrer to the evidence clearly indicated what the ultimate judgment must be if the ruling was adhered to and remained unchanged, yet such ruling remained subject to change or modification until the final judgment should be rendered on the demurrer. After judgment on the demurrer is rendered there can be no change of the ruling on the demurrer. The final judgment, had the circuit court adhered to its ruling on the demurrer, should have been that the plaintiff take nothing by his suit, and that the defendant recover of him his costs.

We hold that the order of the circuit court sustaining the demurrer to the evidence, from which this appeal is prosecuted, was a mere interlocutory order and not a final judgment, and that no appeal lies therefrom.

The appeal is, therefore, dismissed.

Filed Nov. 27, 1894.

No. 17,008.

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HARMLESS ERROR.—*Overruling Demurrer to Paragraph of Answer.*—*Trial and Finding on Another Paragraph.*—The overruling of a demurrer to a second paragraph of answer, if error, was harmless where the trial and the special finding in favor of the defendants were upon the first paragraph of answer.

SUPREME COURT PRACTICE.—*Answer Questioned for First Time on Appeal.*—The sufficiency of an answer can not be questioned for the first time on appeal.

LIBEL.—*Defense.*—*Justification.*—*Sufficiency of Evidence.*—*When Evidence not Broad Enough.*—Where an answer set up in an action

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for libel is that of justification, the same objection that might be urged against the answer, viz., that it is not broad enough to justify the charge published, may be urged against the sufficiency of the evidence.

From the Marshall Circuit Court.

R. B. Oglesbee, for appellant.

S. Parker and *C. Kellison*, for appellees.

HACKNEY, C. J.—The appellant sued the appellees for libel.

The two paragraphs of answer were, first, justification; and, second, that the publication was privileged.

The fact appears from the record, and is conceded by counsel, that the trial and special finding of the court in favor of the appellees were upon the appellees' first paragraph of answer. The action of the court, therefore, in overruling appellant's demurrer to the second paragraph of answer was harmless. *Miller v. Rapp*, 135 Ind. 614; *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571; *McComas v. Haas*, 93 Ind. 276.

The sufficiency of the first paragraph of answer is urged in this court for the first time, and, not having been challenged in the lower court, it can not be attacked in this court. *Chicago, etc., R. R. Co. v. Modesitt*, 124 Ind. 212; *Elliott's App. Proced.*, sections 476—480.

A further question is made upon the sufficiency of the evidence to sustain the finding in favor of the appellees. Did the evidence justify the publication? The complaint alleged the publication, with editorial comment, of a complaint for divorce by a husband, in which he charged his wife generally with having at divers times and places frequently committed adultery with the appellant, and, especially, with having, at a particular time and place, committed adultery with the appellant.

One objection urged against the evidence is that it

wholly fails to support the specific charge of adultery. If the question were one of pleading, there could be no doubt that the justification should be "as broad as the charge and of the very charge attempted to be justified." Townshend Slander and Libel, section 212, p. 362; *Heilman v. Shanklin*, 60 Ind. 424; Newspaper Libel (Merrill), p. 232.

"If the justification does not cover the slander to the full extent, the plaintiff will be entitled to recover for the excess not justified." *Tull v. David*, 27 Ind. 377; *Heilman v. Shanklin*, *supra*.

The general charge of frequent acts of adultery, as a question of pleading, could only have been justified by allegations of specific acts, that the court might judge of their sufficiency and the plaintiff might be advised what he would be required to meet upon the trial. *Johnson v. Stebbins*, 5 Ind. 364; *DeArmond v. Armstrong*, 37 Ind. 35; *Sunman v. Brewin*, 52 Ind. 141; *Mull v. McKnight*, 67 Ind. 535; *Funk v. Beverly*, 112 Ind. 190; *Sharpe v. Stephenson*, 12 Ind. 348; Townshend Slander and Libel, 314.

Though the appellant is denied the right to question the sufficiency of the answer, it is the opinion of a majority of the court that he may urge to the sufficiency of the evidence, the same objection sought to be made against the answer, namely, that it is not broad enough to justify the charge published.

We have cases holding that evidence establishing a bad answer will not uphold a judgment for the defendant. *Freitag v. Burke*, 45 Ind. 38; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Dorman v. State*, 56 Ind. 454; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86. See, also, Elliott's App. Proced., pp. 404, 405.

There is, as appellant urges, an entire absence of evidence tending to support the specific charge of adultery

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alleged in the complaint. If the facts constituting the specific charge were essential to the sufficiency of an answer of justification, we are unable to conclude that justification, as a question of evidence, can be narrower. Looking to the evidence, we find that the charge in the complaint is not fully justified. If we treat the allegation as made, by the failure of the appellant to challenge the answer, we must then apply the rule that the proof must be sufficient to cover the allegations. *Cleveland, etc., R. W. Co. v. Wymant*, 100 Ind. 160; *Thomas v. Dale*, 86 Ind. 435; *Perry v. Barnett*, 65 Ind. 522; *Terry v. Shively*, 64 Ind. 106; *Boardman v. Griffin*, 52 Ind. 101.

It is not necessary that we should pass upon the sufficiency of the evidence to establish the general charge, and as the case may again be tried, no good purpose would be subserved by an opinion upon that question.

The judgment of the circuit court is reversed.

Filed Nov. 26, 1894.

No. 16,884.

SELLERS ET AL. v. STOFFEL.

RECEIVER.—*Sale on Execution or Decretal Order.—Receiver to Collect Rents and Profits, etc., During Year for Redemption.*—The statute gives the owner of real estate sold on execution or decretal order the right of possession during one year from the date of sale, during which time he has the right of redemption, and it is only in a clear case of necessity, in order to protect the rights of others, that the owner ought to be deprived of this right by taking from him his property and placing it in the hands of a receiver. If, in any event, it would be proper to appoint a receiver to collect the rents and profits during the year for redemption, the rents and profits should be paid into court for the use of the person entitled thereto.

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SAME.—Sufficiency of Application.—Foreclosure of Mortgage.—Rents and Profits.—While the allegations in an application for a receiver may be supplemented and enlarged by affidavits and oral testimony, yet the appointment can not be sustained if the allegations fail to show statutory or equitable grounds upon which it may stand; and where the only allegations as to the appointment of a receiver, in an action to foreclose a mortgage, are "that said premises can be rented from \$8 to \$12 per month, and asks that a receiver be appointed by this court to take charge of said premises and collect said rent and pay the same into court to be applied on said mortgages," no case is made justifying such appointment.

From the Huntington Circuit Court.

J. M. Hatfield, for appellants.

C. W. Watkins, B. F. Ibach and J. F. Bickel, for appellee.

HOWARD, J.—This was an action for the foreclosure of a mortgage on real estate, and for the appointment of a receiver to collect rents and profits.

The record has not been prepared with care, and is quite unsatisfactory.

If the complaint is correctly set out, it was certainly subject to a motion to make more specific.

There was an answer in general denial, and the cause was submitted to the court for trial.

It was found by the court that the debt due was \$204.05, and that the mortgage should be foreclosed. Judgment was rendered for the amount of the debt, and a decree of foreclosure, and for the sale of the real estate was entered.

There was neither finding nor judgment upon the issue as to the appointment of a receiver.

The decree closes with these words: "All of which is finally ordered, adjudged and decreed by the court."

This decree was entered on the tenth day of the October term, 1892, of the court, and would seem to have been a final adjudication of the issues joined in the case.

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The record, however, shows that on February 23, 1893, being the 34th day of the January term, 1893, of said court, the following proceedings were had:

"Comes the plaintiff by Watkins & Dungan, his attorneys, and come the defendants by J. M. Hatfield their attorney, and on the plaintiff's motion his application for the appointment of a receiver herein is submitted to the court.

"And the court being fully advised in the premises finds that the said application is fully sustained, and that a receiver ought to be appointed to take charge of the property described in said application and receive the rents and profits thereof.

"It is, therefore, ordered by the court that William A. Branyan be, and he is hereby, appointed a receiver of the following described real estate (describing it); and he is ordered and directed to rent said property, and apply the rents and profits to the payment of the mortgages thereon."

This action of the court in the appointment of a receiver was excepted to by the appellants, and is the only error assigned.

How the case came to be on the docket at the January term, after there had been a final decree at the October term, does not appear. But as both parties were present in court by counsel on February 23, 1893, and no objection seems to have been made to the consideration of the matter of the receivership then brought up again, we must presume, in the silence of the record, that the cause had been continued at the October term, as to the receivership, or that the matter was in some other manner properly before the court.

No application for the appointment appears, except that shown in the complaint. While the certificate of the clerk to the record shows it "to be a full, true, cor-

rect and complete copy of all the proceedings had in said cause.”

We shall, therefore, look to the application for a receivership, as set out in the complaint, to discover whether the appointment was justified.

In an action pending on due notice, or on appearance of the adverse party, a receiver may be appointed, either before or after judgment, when necessity therefor is shown. The application is properly made on written motion or petition, either as a part of the complaint or cross-complaint or as a distinct petition. No other pleading is necessary than the application itself. *Pressley v. Harrison*, 102 Ind. 14; *Pressley v. Lamb*, 105 Ind. 171; *First Nat'l Bank, etc., v. U. S. Encaustic Tile Co.*, 105 Ind. 227, section 1244, R. S. 1894 (section 1230, R. S. 1881).

The application for the appointment of a receiver, however, as any other petition or complaint, should be sufficient in itself, and should therefore contain the allegations necessary to show why the prayer should be granted.

Main v. Ginthert, 92 Ind. 180, was an action in which Eliza Ginthert had filed a cross-complaint for the appointment of a receiver to take charge of rents and profits during the pendency of a suit to foreclose a mortgage. The trial court came to the conclusion that, upon the facts averred in the cross-complaint, a receiver ought to be appointed.

The appeal in that case was against the order appointing the receiver, and it was assigned as error that the court below had overruled a demurrer to the cross-complaint.

The court said, in considering the sufficiency of the cross-complaint as an application for the appointment of a receiver: “The fair inference, from the facts averred in Mrs. Ginthert’s cross-complaint, is that the mortgaged

property, aside from her interest in it, was insufficient to pay the mortgage debt, and that her husband had no other or remaining property out of which the deficiency could be made. * * * What we have said as to the sufficiency of the cross-complaint carries us to the inevitable conclusion that a good *prima facie* case was made for the appointment of a receiver, and that for that reason a receiver was properly appointed."

It is true, as said in *Naylor v. Sidener*, 106 Ind. 179, that "the averments of the complaint may be supplemented, and in effect enlarged, by the presentation of affidavits or the introduction of oral testimony in support of an application for the appointment of a receiver, and that all will be taken into consideration in determining whether a receiver ought to be appointed. *Barnes v. Jones*, 91 Ind. 161; *Pouder v. Tate*, 96 Ind. 330."

While, however, the allegations in the application for a receiver may be supplemented and enlarged by affidavits and oral testimony, yet the appointment can not be sustained if the allegations fail to show statutory or equitable grounds upon which it may stand.

In *Bufkin v. Boyce*, 104 Ind. 53, as in the case before us, "the complaint was regarded as an application for a receiver." Of the complaint in that case the court said: "Considering it merely as an application for the appointment of a receiver in an action pending, and regarding the facts shown by it, with those set forth in the answer and reply, as grounds stated for and against the appointment of a receiver, we think no case is made justifying such appointment." We think that a like conclusion must be reached in this case.

In section 1236, R. S. 1894 (section 1222, R. S. 1881), seven cases are stated in which a receiver may be appointed, and in none of these cases would the appoint-

ment of a receiver be authorized under the allegations of the complaint which we are considering.

The sole clause in the complaint relating to a receiver is as follows:

"The plaintiff further avers that said premises can be rented from \$8 to 12 per month, and asks that a receiver be appointed by this court to take charge of said premises and collect said rent and pay the same into court to be applied on said mortgages."

For aught that appears from this allegation, the value of the land to be sold may be ample to secure the debt. Indeed, a property that will rent for from ninety-six to one hundred and forty-four dollars per year would clearly seem to be worth many times the debt found due, which is, all told, but little over two hundred dollars.

It will be noticed, in passing, that the prayer is that the rent should "be applied on said mortgages." If in any event it would be proper to appoint a receiver, the rent should be paid into court for the use of the person entitled thereto. In case of redemption, the rents would belong to the owner, and should not be applied on the mortgage debt.

The statute gives the owner of real estate sold on execution or decretal order the right of possession during one year from the date of sale; during which time also he has the right of redemption. Sections 779, 780, R. S. 1894 (sections 767, 768, R. S. 1881).

It is the positive statutory right of the owner to have possession of his land during this time, that he may retrieve his fortunes, if possible; and it is only in a clear case of necessity, in order to protect the rights of others, that the owner ought to be deprived of this right by taking from him his property and placing it in the hands of a receiver.

For an exhaustive discussion of the respective rights,

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under these statutes, of mortgagors, mortgagees, and purchasers at judicial sales, see *Merritt v. Gibson*, 129 Ind. 155, and authorities there cited.

We think no ground for the appointment of a receiver is shown in this case, and the order appointing a receiver is reversed.

DAILEY, J., was absent during the consideration of this case.

Filed Nov. 26, 1894.

No. 17,092.

HUGHES ET AL. v. HUGHES.

EVIDENCE.—*When not in Record.*—*Reporter's Longhand Manuscript.*—*Filing.*—*Bill of Exceptions.*—Where it appears from the clerk's certificate that the reporter's longhand manuscript is included in the transcript, but that it was not filed, and was not included in a bill of exceptions, the evidence is not in the record.

From the Clinton Circuit Court.

J. W. Cooper and *J. C. Suit*, for appellants.

M. A. Morrison, for appellee.

DAILEY, J.—The appellee, William T. Hughes, petitioned the Clinton Circuit Court for the establishment and construction of a public ditch. The petition therefor is in proper form, and shows the petitioner to be the owner of certain lands therein described, and the defendants to said proceeding to be the owners of certain other specified lands, which, it is claimed, would be beneficially affected by locating and constructing the ditch prayed for upon a route designated in said petition.

Upon the filing of the report of the commissioners of drainage, the appellants and others remonstrated. This

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report was then withdrawn and leave was granted to file a new report.

At a subsequent term of court a second report was filed, to which the appellants remonstrated. Thereupon a trial was had, resulting in a finding for the appellee. The court then ordered the drainage prayed for, and approved the assessments made therefor.

The appellants moved for a new trial, which was overruled and exceptions thereto duly taken, after which an appeal was prayed and granted.

There are two assignments of error, but as the appellants have failed to argue the first specification, it is thereby waived.

The second specification is that "the court erred in overruling appellants' motion for a new trial."

The argument of counsel in support of this contention is based upon certain evidence claimed to have been introduced on the trial. But the evidence is not in the record. By reference to the clerk's certificate, it appears that the longhand manuscript filed by the official reporter of the court, is included in the transcript. It is well settled, however, that the evidence can be brought into the record only by bill of exceptions, and the filing of the longhand manuscript by the reporter is insufficient. The clerk's certificate in the cause is dated August 25, 1893.

On September 2d, following that date, the transcript, as an entirety, was presented to the court, and certified by it as being correct.

The judge's certificate is not in the transcript at all, but follows the clerk's certificate thereto, and is therefore outside of the record. It is the proper practice to have the clerk certify that the record is correctly presented by the transcript, but here the court makes that certificate. If it was intended to have the court's signature to the

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portion including the evidence, it would have been necessary to get it before the transcript was made, and file the bill so signed as a paper in the cause. Until this is done, it is not a part of the record, and the evidence is not in the record.

The date of the judge's signature shows that he did not append his name to anything until after the transcript was made and signed by the clerk, and that it can not include a bill of exceptions containing the evidence. It brings to light clearly the fact that no such bill, even if signed, was ever filed, and until that time it is no part of the record.

Indeed, the clerk does not state that the bill was ever filed, and, aside from this, the place of the judge's signature does not indicate that it was intended to be attached to, or connected with, any bill of exceptions.

There are other complaints made concerning the proceedings of the trial court, but owing to the state of the record, they are not available, and we need give them no attention.

The judgment is affirmed, with costs.

Filed Nov. 27, 1894.

No. 16,594.

THE LEBANON LIGHT, HEAT AND POWER COMPANY ET
AL. v. GRIFFIN.

CONTRIBUTORY NEGLIGENCE.—*Boy Twelve Years of Age.—When Tenderness of Years and Incapacity are not in Issue.—Complaint.—Theory of.*—A boy twelve years of age may, through tenderness of years and want of capacity, be tempted by treacherous objects thrust in his way by the carelessness of others, and be incapable of discerning the presence of danger such as that to which the injured party was

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here exposed, viz., a gas pipe loose in the highway, poorly jointed and subject to a high pressure of gas, which was escaping and burning several feet high in the presence of the plaintiff. The allegations of the complaint, however, should, in such cases, be such as to make tenderness of years and want of capacity issues in the case, and these allegations should be supported by the evidence. The mere statement that plaintiff was twelve years of age is not sufficient, especially where there are allegations as to his superior intelligence and other endowments, so strongly set forth as to make the complaint substantially the same as it would be in case of an adult.

SAME.—*Instructions to Jury.—Not Relevant to Issues.—Incapacity and Tenderness of Years.*—In such case, it was error to instruct the jury, in relation to plaintiff's contributory negligence, as if the tenderness of years and the incapacity of the plaintiff were in issue, when, in fact, they were not.

From the Clinton Circuit Court.

G. Shirts, I. A. Kilbourne, E. P. Schlater, T. J. Terhune, B. S. Higgins, T. H. Palmer and W. F. Palmer, for appellants.

P. W. Gard, J. C. Farber, T. J. Kane and C. W. Griffin, for appellee.

HOWARD, J.—The facts in this case, as to the construction and maintenance of appellants, gas plant, in so far as concerns the acts of appellants themselves, are the same as in the case of *Lebanon Light, Heat and Power Co. v. Leap*, 139 Ind. 443.

The defendants in the former case were the same as in this case. One of those defendants, however, John E. Snow, who drilled the gas wells, does not appear as an appellant here, judgment having been rendered in his favor in this case.

The complaints in the two cases are substantially the same, except as to the names and ages of the appellees. The appellee, Griffin, in this case, received his injury at the same time, and by the same accident, as the appellee, Leap, in the former case.

In the Leap case, we held that the appellants were

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guilty of negligence in bringing about the injuries complained of. The same holding must be made in this case.

It remains, therefore, to inquire whether the appellee in this case was himself guilty of negligence contributing to his own injury.

As bearing on this question, the following instruction given at the request of the appellee is complained of:

"9th. If you believe, from the evidence, that at the time of this accident the plaintiff was an inexperienced boy, eleven years of age, and that the defendants had shortly prior thereto negligently and carelessly constructed, or that they were at that time negligently and carelessly operating, the gas pipe lines in and along the public highways adjacent to the home of the plaintiff's father, substantially in manner and form as alleged in the complaint, and that said pipe line was then, at the point where said accident occurred, on account of said negligence and carelessness of said defendants, in an unsafe and dangerous condition, and that said dangers were open and obvious to an adult person, but not so to children of the age and experience of the plaintiff, then if you believe that the condition of said pipe lines at said point were such as to attract children of the age of plaintiff thereto, and that plaintiff, prompted by curiosity, touched, took hold of, or lifted, a neglected or exposed part of said pipe, and that such act of the plaintiff, owing to the negligence and carelessness of the defendants, was the immediate cause of the explosion, or in any manner contributed to his injuries, and that such act of the plaintiff was innocent and not incautious, such facts would not, under the circumstances indicated, constitute contributory negligence, and would not prevent or debar a recovery on the part of the plaintiff."

Other instructions of a similar character, based upon

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the alleged age of the appellee, are also objected to.

In referring to appellants' objections to these instructions, counsel for appellee say: "They claim that for the reason that this innocent and inexperienced boy, between eleven and twelve years of age, prompted by curiosity, stood by and looked at the blaze, and the accident happened while he was there, made him guilty of contributory negligence. * * * Is it strange when this child saw this pipe in the public highway at a crossing, placed there by supposed skilled workmen, permitted to remain there in the condition that the evidence in this case shows for a number of days, is it not probable that he would be prompted by curiosity to look at it, and would not the fact that the pipe was permitted to remain in the place it was by the owners thereof, and by the public, have a tendency to give him assurance of safety, instead of danger, in viewing the burning gas?"

These observations of counsel, and the instructions objected to, are based upon the theory that the appellee was at the time of the accident a child of immature years, tempted by curiosity, and incapable, by reason of his tender age, of understanding the danger to which he exposed himself in standing near the burning gas, and lifting up the joint of pipe which was blown out. The instructions would have been correct as applied to such a theory.

The complaint, however, does not sustain such a theory, unless it be in the following allegations:

"That on the 20th day of September, 1890, the said, gas was escaping and burning in a flame five or six feet high, and that said plaintiff was ignorant of said defective and imperfect construction aforesaid, and the plaintiff was young and inexperienced, and with but a limited knowledge, and imperfect comprehension of the dangers attending the handling, using and transporting of

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natural gas, was lawfully and rightfully in said highway, at or near the point where this joint of pipe intersected with said line, and was at or near the north end of said joint of pipe, and was watching said burning gas, and may have inadvertently touched the said joint of pipe at or near the north end thereof, and without fault or want of care on his part, on account of said negligence and carelessness of said defendants, the said joint of pipe was blown out," etc.

We do not think these allegations sufficient to show that appellee was a child of tender years, and incapable of exercising judgment as to the danger encountered by him on the occasion when he was injured.

But the complaint also contains the following allegations:

"The plaintiff was on and prior to the 20th day of September, 1890, a strong, active, intelligent and energetic boy, twelve years of age, in good health, and full possession of all his faculties, and with good prospects for a long and successful life."

These allegations, certainly, are consistent only with the theory that the appellee was of superior judgment and discretion, and quite capable of taking care of himself in the presence of such danger as threatened him at the time of his injury.

That a boy twelve years of age may, in fact, through tenderness of years and want of capacity, be tempted by treacherous objects thrust in his way by the carelessness of others, and be incapable of discerning the presence of danger such as that to which appellee was here exposed, we may well believe. *Tucker v. New York, etc., R. R. Co.*, 124 N. Y. 308; *Westbrook v. Mobile, etc., R. R. Co.*, 66 Miss. 560, and note to latter case in 14 Am. St. Rep. 590.

The allegations of the complaint, however, should in

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such cases be such as to make tenderness of years and want of capacity issues in the case; and these allegations should be supported by the evidence. The mere statement that appellee was twelve years of age is not sufficient, especially when the allegations as to his superior intelligence and other endowments are so strongly set forth as to make the complaint substantially the same as it would be in the case of an adult.

We think, therefore, that the instruction above set out, and other instructions of like import, based upon the theory of appellee's tender years and immaturity of intellect, however correct in a proper case, are not applicable to the theory of the complaint or to the evidence adduced in this case.

Other interesting questions are discussed by counsel, but we do not think that they will arise on another trial of the case.

The judgment is reversed, with instructions to grant a new trial and with leave to amend the pleadings.

Filed Nov. 27, 1894.

No. 17,091.

WOODFORD ET AL. v. HAMILTON ET AL.

INTOXICATING LIQUORS.—*Sale to a Woman for Retail Purposes.*—Agent.

—*Contract for Purchase-money Unenforceable.*—*Public Policy.*—H., a woman, who was the owner of saloon fixtures and stock, executed a written contract with D., by the terms of which it was agreed that D. should apply in his own name and procure a license from the board of commissioners to sell intoxicating liquors, using H.'s fixtures, etc., and that when the license was procured, D. would retail the liquors for a salary of \$45 a month, which H. agreed to pay, and that after the current expenses are paid from the receipts the overplus was to go

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to H. W. supplied liquors to be sold in the saloon, which was charged to "D—— for H——."

Held, that as W. sold the liquor to H.'s agent, knowing the capacity in which he acted, and the use to be made of it (such use being against the express provisions of the statute, and contrary to public policy), the law will not aid W. to enforce his contract of sale, but will leave the parties in the situation in which they have placed themselves.

SAME.—*A Woman can not Obtain License for Sale of.*—*Sale by Unlawful.*—A woman is inhibited by statute from obtaining a license to vend intoxicating liquors at retail, and when they embark in such business they engage in an unlawful act.

From the Jackson Circuit Court.

D. A. Kochenour, for appellants.

R. Applewhite and J. F. Applewhite, for appellees.

DAILEY, J.—This was an action commenced in the Jackson Circuit Court by the appellants, George A. Woodford and John Pohlman, against the appellee Anna C. Hamilton, to recover on an account for certain liquors sold and delivered by the appellants to stock up a saloon for the retail business, and to set aside a conveyance subsequently made, of certain real estate, by Anna C. Hamilton, to her co-appellee Bridget Hamilton, as fraudulent, and subject the same to the payment of said claim.

There was an answer in general denial which put the case at issue. The cause was submitted to the court for trial, and, at the request of the plaintiffs, it made special findings of facts and stated its conclusions of law thereon. The court afterwards entered judgment upon the special findings that the plaintiffs take nothing by reason of their complaint herein, and that the defendants do have and recover from the plaintiffs their costs and charges in this behalf laid out and expended.

It appears from the special findings, that in 1890, 1891, and 1892, the plaintiffs were partners, doing busi-

ness as wholesale liquor dealers at Indianapolis, Indiana; that prior to June, 1890, the defendant had a chattel mortgage upon certain bar fixtures, furniture and stock of goods situated in a saloon, known as the "Arcade," in the city of Columbus, Indiana, to secure the payment of one thousand dollars, loaned money, due Anna C. Hamilton from William C. Heaton, which was only a second mortgage. The first mortgage belonged to some one else, and it secured the payment of \$300; that she had to and did pay the superior mortgage, and had to and did take the mortgaged chattels in April or May, 1890, in satisfaction of her debt and what she paid. Being the owner of such fixtures, furniture and stock, she executed a written contract with one Perry McDonald, by the terms of which it was agreed by said McDonald and said Anna C. Hamilton, a woman, that the former would apply in his own name and procure a license from the board of commissioners of Bartholomew county, Indiana, to sell intoxicating liquors at retail in said "Arcade" saloon, using her fixtures, furniture, etc., and that when the license was so procured, said McDonald would carry on the retailing of such liquors for a salary of \$45 per month, which she agreed to pay him, and that after the current expenses were paid from the receipts of said concern the overplus and profits were to go to her, and this contract extended one year; that said McDonald procured such license and said Hamilton paid the license fees to the county and city; that thereupon she, by written appointment, constituted one W. H. Shea, of Columbus, as manager generally of such business, requiring McDonald, as barkeeper, to account and report to said Shea, her manager, and thereupon said McDonald, under such arrangements, proceeded in said saloon to open out and carry on the business of selling spirituous, vinous and malt liquors under said license.

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Thereafter part of the liquors sold in said saloon were obtained from plaintiffs.

The first item of \$83.60, for whisky, was sold July 16, 1890, and the credit therefor was given to McDonald, as plaintiffs did not then know of said arrangement between him and Anna, and at that date did not even know her; that the plaintiffs, soon after, ascertained all the facts as to the arrangements by which the business was being conducted, and then continued to sell whisky and brandy to be sold in said saloon, by one of the plaintiffs going into the saloon and taking orders therefor, to wit: October 30, 1890, \$99.75 worth of brandy; December 15, 1890, \$89.20 worth of whisky; and, on February 11, 1891, \$121.25 worth of whisky.

All of these last three items of sales were made to Shea, as manager, and received in the saloon and sold at retail by McDonald, barkeeper, and these were charged to "McDonald for Anna C. Hamilton," by plaintiffs, when sold; that plaintiffs never talked, or communicated personally in referring to these matters relating to such sales, with Anna C. Hamilton, and during the year from June, 1890, to June, 1891, she was not personally in said saloon, but resided all the time in Jackson county, Indiana.

The third and last conclusion of law drawn from the foregoing facts, "that the plaintiffs shall take nothing," covers the entire question for our consideration.

The only specification of error is that "The court erred in the conclusions of law stated upon the special finding of facts.

From the findings of the court, it is clear that the liquors, for which a recovery of money is sought in this action, were sold by the plaintiffs and delivered to be sold by retail in a saloon run, owned and controlled by a

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woman, and the query that confronts us is: Can a woman lawfully engage in retailing intoxicating liquors?

Sections 5312, 5314 and 5315, R. S. 1881, Burns R. S. 1894, sections 7276, 7278 and 7279, provide that any *male inhabitant*, having certain other specified qualifications, may obtain a license by proceeding in the manner therein prescribed.

It is a maxim of the law that "the express mention of one person or thing is the exclusion of another." Wharton's Legal Maxims, p. 11.

Or, as stated by another eminent author, "What is expressed makes what is silent to cease." Coke Litt., 210a.

Controlled by this established principle of construction, it is clear that women are inhibited, by statute, from obtaining a license to vend intoxicating liquors at retail, and when they embark in such business, they engage in the commission of an unlawful act.

Indeed, it was held by this court, in *Welsh v. State*, 126 Ind. 71, that the Legislature has power to restrict the granting of licenses to male inhabitants of the State, and, in this case, when the plaintiffs sold the liquors to the appellee Shea or McDonald knowing the use there was to be made of them, and it being a part of the contract of sale made by the appellants that they were to be sold in said saloon in violation of law, the retailing of such liquors was not only without authority of law, but against the express provisions of our statutes, and contrary to public policy.

Under this condition of affairs, the law will not aid the appellants in an effort to enforce their contract, but will leave the parties in the situation in which they have placed themselves. *Hutchins v. Weldin*, 114 Ind. 80.

As to the first item of the account, amounting to \$83.60, it is suggested by appellants' learned counsel in

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his brief, that it is an elementary principal of the law of agency, too well established to need citation of authorities, that when an agent deals with a seller and buys goods as though he were the principal, and without disclosing his agency, the seller, afterwards, when he learns the facts, has his option either to hold the agent personally responsible for payment, or recover the price from the principal for whose benefit the transaction was made. *Nelson v. Powell*, 3 Doug. 410; *Beebe v. Robert*, 12 Wend. 413; 1 Am. and Eng. Encyc. of Law, pp. 415, 416.

But this doctrine has no application to a case where the principal is not possessed of the power to enter into the contract for which it is sought to hold her liable. The agent can not bind the principal in a transaction where, if she were present, acting in her own behalf, she could not bind herself.

The judgment is affirmed, with costs.

Filed Nov. 26, 1894.

No. 16,323.

FERRIS v. THE BERKSHIRE LIFE INSURANCE COMPANY.

QUIETING TITLE.—*Judgment Lien*.—*Tax Lien*.—The question involved here, that the title of one holding under a judgment lien can not be quieted until the tax lien thereon is discharged, was decided in *Browning v. Smith*, 139 Ind. 280.

NEW TRIAL.—*As of Right*.—*Abandonment of*.—*Right to Commence Action Anew*.—Where parties are entitled to a new trial as of right, they can not abandon such right by dismissing the cause, and then commence the action anew.

From the Marion Circuit Court.

F. J. VanVorhis, *W. W. Spencer*, *W. E. Niblack*, *S. Claypool* and *E. P. Ferris*, for appellant.

O. B. Jameson, for appellee.

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COFFEY, J.—This was an action brought by the appellant against the appellee in the Marion Circuit Court to quiet title to the real estate described in the complaint in the cause. A trial resulted in a special finding of the facts and conclusions of law thereon, upon which the court rendered judgment for the appellee.

The appellant assigns as error that the circuit court erred in its conclusions of law upon the facts found.

It appears from the facts found by the court that Browning and Sloan recovered judgment in the Marion County Superior Court against the Indianapolis Wagon and Agricultural Works on the 19th day of October, 1876, which, at that time, became a lien on the real estate in controversy. On the 23d day of February, 1886, the property was sold on an execution issued on this judgment and the appellant claims title under this judgment and sale. It further appears that the taxes on this property were permitted to run delinquent and, remaining unpaid, it was sold for the nonpayment of such taxes, and that the appellee, at the time of the commencement of this suit, held the lien of the State for such taxes if it was not in fact the owner of the property. The appellant has never paid, or offered to pay, these delinquent taxes or in any manner to discharge the lien created thereby.

Under this state of facts we think it clear that the appellant was not entitled to a decree quieting his title to the real estate involved in this suit.

Assuming, without by any means deciding, that the appellant now holds the title owned by the Indianapolis Wagon and Agricultural Works at the time the judgment in favor of Browning and Sloan was rendered, it was his duty, as it would be the duty of that corporation, to pay the taxes legally assessed against the property before he could have the title quieted. The tax lien was superior

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to the judgment lien of Browning and Sloan and the sale on the judgment was subject to that lien. The title held by the appellant, if he has any, is subject to that lien, and it would be unjust and inequitable to permit him to quiet title against the holder of the lien. The rule that he who asks equity must do equity is applicable to the case, and until appellant pays or offers to pay this superior claim a court of equity "will not so much as lift a finger to aid him."

The question involved in this case was also involved in the case of *Browning v. Smith*, 139 Ind. 280, and it was there held that the title could not be quieted until the tax lien was discharged. We adhere to that ruling.

The court did not err in its conclusions of law upon the facts stated in the special finding.

As bearing upon the question here decided see *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 64 Ind. 360; *Lancaster v. Du Hadway*, 97 Ind. 565; *Rowe v. Peabody*, 102 Ind. 198; *Shannon v. Hay*, 106 Ind. 589.

After the rendition of judgment, the appellant moved the court for a new trial as of right, but his motion was overruled and he excepted. The bill of exceptions states that the motion was overruled "for the reason that there has been already two trials upon the merits of this cause as to the same property."

It appears from the finding of facts before us that the appellant and Robert Browning commenced an action in Marion county against the appellee and others to quiet title to the same land now in dispute, which action was tried in the Morgan Circuit Court, to which it had gone on change of venue, on the 1st day of June, 1888. The trial resulted in a finding and judgment against the appellant and Browning.

On the 25th day of May, 1889, the plaintiffs in that action applied for and obtained a new trial as of right

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under the statute. They failed to enter upon another trial of the cause, but subsequently dismissed it and the appellant commenced this action.

The judgment rendered in the Morgan Circuit Court was a bar to this action. *Ferris v. Udell*, 139 Ind. 579.

The appellant and Sloan were entitled to a retrial of the issues tendered in the case pending in the Morgan Circuit Court, but they could not abandon that right and commence a new action. If they were permitted to do so, and then obtain a new trial in an action subsequently brought for the same cause in another court, there would be no end to litigation in an action involving title to real estate. Our statute giving the losing party one new trial, as of right, in this kind of action, was not intended to secure the result contended for by the appellant in this suit.

In our opinion the court below did not err in refusing to grant the appellant a new trial of this cause as of right.

Many other questions are presented and argued by the parties to this suit, but as the questions here decided dispose of the case on its merits, we deem it unnecessary to consider them.

Judgment affirmed.

HACKNEY, J., took no part in the decision of this cause.

Filed Oct. 9, 1894; petition for a rehearing overruled Dec. 19, 1894.

No. 16,857.

THE CINCINNATI, WABASH AND MICHIGAN RAILWAY COMPANY v. THE CITY OF ANDERSON.

RAILROAD.—*Extending Street Over Railroad Yards Containing Switches, Engine House, etc.—Injunction.*—If, to extend a street as projected over the yards of a railroad company, containing side tracks, engine house, water tank, coal dock, etc., would not only increase the hazards of the business, but would include within the limits of said street two stalls of said roundhouse and a considerable portion of the coal dock, and would not permit the use of the water tank, without encroaching upon the street, the land can not be thus appropriated for street purposes, and such threatened appropriation may be enjoined.

SAME.—*Use of Ground for Yards, Engine House, Coal Dock, etc., a Public One.—When More than One Public Use May be Made of the Same Land.—When Not.*—The use of the ground by the railroad for the purposes above mentioned is a public use, and where the use of the ground for railroad purposes and for street purposes may coëxist without impairment of the first use, it may be appropriated to the use of both; but where such uses can not coëxist, or where the first use is materially impaired or destroyed, the second public use will be denied.

From the Delaware Circuit Court.

C. E. Cowgill, J. T. Dye, B. K. Elliott and W. F. Elliott, for appellant.

F. P. Foster and H. C. Ryan, for appellee.

HACKNEY, C. J.—This was a suit by the appellant to enjoin the extension of Seventh street, in said city, from the east line of the appellant's right of way westward across the main track, and five side tracks in appellant's yards. Within said yards were an engine house of brick and stone, containing six stalls, and being sixty feet deep, eighty feet long in front, and one hundred and forty feet long in the rear; in front of this building was a turn table from which there were six tracks extending into said engine house, and connecting with six stalls

139	490
142	406

139	490
149	176
149	178

139	490
153	238

139	490
169	220

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therein. In said yards was also a water tank from which locomotives were supplied with water, and also a coal dock, constructed from timbers and lumber, the same being twenty-three feet wide by eighty-six feet in length, and from which the locomotives of the appellant were supplied with coal. The various side tracks within said yards were used for the storage of freight and passenger cars, and for making up trains, and for reaching said water tank, coal dock, turn table and round house. Said engine house was not large enough for the business of the company, and additions were contemplated.

To extend said street as projected would not only inconvenience the appellant in the use of its yards, by meeting the uses of the street by the public and increasing the hazards of its business, but it would take within the lines of said street two of the stalls of said round-house and a considerable portion of said coal dock, and would not permit the use of said water tank without encroaching upon said street slightly. Immediately south of the projected street parallel with said tracks and a part of said yard the appellant owned ground upon which such water tank, coal dock, turn table and round house could have been located, and with changes in some of the side tracks mentioned could have been used as conveniently and practicably with the same advantages, excepting the necessity of keeping said projected extension free from standing cars, and the said added hazards by reason of the crossing and recrossing by the public of the appellant's said tracks.

That the uses for which the appellant employed the strip proposed to be taken for the street crossing, were of a public character, and that they could not be appropriated to the uses of a public street, if to do so would destroy or become inconsistent with the purposes for which they were so employed, is conceded by the parties.

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The question upon which the controversy hinges, and upon which counsel have placed the case in argument, is this: Can these buildings and structures be destroyed and removed from their fixed location, and their use, where situated, be entirely thwarted, and their location applied to a new public use upon the showing that they may be rebuilt and conveniently and practicably used for the same purposes on other land of the company near to that now occupied?

Under the general law permitting cities to establish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad when in doing so the uses for which such right of way is employed are not materially injured or destroyed, and where such uses and those for a street may coexist without impairment of the first uses. But where such uses can not so coexist, or where the first use is materially impaired or destroyed, it is well settled in this State and elsewhere that the second public use will be denied. *Lake Erie, etc., R. W. Co. v. Town of Boswell*, 137 Ind. 336; *City of Ft. Wayne v. Lake Shore, etc., R. W. Co.*, 132 Ind. 558; *City of Seymour v. Jeffersonville, etc., R. R. Co.*, 126 Ind. 466; *City of Valparaiso v. Chicago, etc., R. W. Co.*, 123 Ind. 467; *Prospect Park, etc., R. R. Co. v. Williamson*, 91 N. Y. 552; *In re City of Buffalo*, 68 N. Y. 167; *In re Boston, etc., R. R. Co.*, 53 N. Y. 574; *Albany, etc., R. R. Co. v. Brownell*, 24 N. Y. 345; *Milwaukee, etc., R. W. Co. v. City of Faribault*, 23 Minn. 167; *Hannibal, etc., R. R. Co. v. Muder*, 49 Mo. 165; *Mohawk, etc., R. R. Co. v. Artcher*, 6 Paige, 83; *St. Paul, etc., Co. v. City of St. Paul*, 30 Minn. 359; *New Jersey, etc., R. W. Co. v. Long Branch Comrs.*, 39 N. J. L. 28.

At the point of the crossing of the projected extension of Seventh street and the right of way of the appellant, there are other public uses existing than the mere main-

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tenance of tracks for the transportation of passengers and freight or the storage of cars and the making up of trains. The turn table, the water tank, the engine house, the coal dock, are each and all not only generally essential to the business and successful operation of a line of railway, but in this instance they were made to serve two divisions of railway, each having a terminus at the city of Anderson, where locomotives were supplied with coal and water, and were housed when not in service. Not only were they essential, but it is not even suggested that they could be dispensed with. That they were of themselves, when connected with the operation of the railway, public uses, not only appears from their necessity to the successful operation of a railway, but from the numerous cases holding that for such uses real estate may be condemned and appropriated under general laws for the appropriation of real estate to railway uses. *In re New York, etc., R. R. Co.*, 77 N. Y. 248 (for freight and warehouses); *Low v. Galena, etc., R. R. Co.*, 18 Ill. 324 (paint shops, lumber and timber sheds); *Hannibal, etc., R. R. Co. v. Muder, supra*, and *Chicago, etc., R. R. Co. v. Wilson*, 17 Ill. 123 (depot, engine house and repair shops); *In re New York, etc., R. R. Co., v. Kip*, 46 N. Y. 546 (depots, car sheds, engine houses, etc.).

There are probably many other like cases, but we think there can be no doubt upon this conclusion, which finds added support from the cases expressly denying the right to condemn and apply to street crossings property of like character already in use for such purposes by railway companies. *City of Valparaiso v. Chicago, etc., R. W. Co., supra*; *City of Ft. Wayne v. Lake Shore, etc., R. W. Co., supra*; *Prospect Park, etc., R. R. Co. v. Williamson, supra*; *Milwaukee, etc., R. W. Co. v. City of Faribault, supra*; *St. Paul, etc., Co. v. City of St. Paul, supra*; *Winona, etc., R. W. Co. v. City of Watertown*, 56 N. W.

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Rep. 1077 (S. Dak.); *New Jersey, etc., R. W. Co. v. Long Branch Com'rs, supra.*

The theory of the appellee, and that adopted by the circuit court, is that such buildings and structures are not indispensable for the reason that they may be conveniently located elsewhere, and after relocation the uses of the street and the railway may coexist.

This theory is not new, but, if adopted by any of the adjudged cases, the fact has not been discovered by us; on the contrary, numerous cases have denied it.

In re New York, etc., R. R. Co. v. Kip, supra, it was said: "It is claimed that there are other lands in the same vicinity, equally well adapted to the use of the applicant as those sought to be acquired by these proceedings, and which, possibly, might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company, is within the discretion of the managers, and courts can not supervise it."

In *New York, etc., R. W. Co. v. Metropolitan, etc., Co.*, 5 Hun, 201, it was said: "Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellant's counsel. It is not a question of possibilities nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by conflicting evidence, whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who lo-

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cate the tracks of a railroad, for it can not be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purpose."

In *Eldridge v. Smith*, 34 Vt. 484, it was held that "When land is taken for a legitimate railroad use by the railroad company, the judgment of the officers of the road, unless clearly beyond any just necessity, is regarded as conclusive." We may add that if round houses, water tanks, coal docks, or other necessary uses of a railway may be disturbed, and relocated, or their location destroyed, it becomes a matter of extreme difficulty, if not an impossibility, to discriminate between such right, and the right to require tracks to be removed for the benefit of other public uses; and, further, if the removal of such buildings and structures may be required to appropriate their location to other public uses, it would be difficult to determine why depots should not be subject to the same rule. Another difficulty in adopting the theory contended for by the appellee, is that the rule could not be made to depend upon the proximity of the old to the new location, for if the removal were required, and there was no ground for the new location in the immediate vicinity, public necessity in pressing its demand for a street crossing could insist with force that remote situations afforded equal or better facilities for the convenient and safe employment of the uses sought to be superseded.

Without legislative sanction, it is our opinion that such uses can not be destroyed upon the mere discovery that they may be enjoyed at some place other than the point of their location.

It is suggested that the act of March 6, 1891, Acts 1891, p. 122, purporting to authorize the removal of buildings and structures of railway companies from the lines of pro-

 Thalls *et al.* v. Smith.

jected streets, and permitting the use of crossings at such points, grants the power sought in this case to have been exercised. The proceedings to condemn the crossing were instituted, and the reference of the matter to the city commissioners was as early as December 1, 1890, and said commissioners filed their report of meeting and examination in January, 1891; this suit was commenced, and the venue changed before the passage of said act. We are unable to find any reason or authority for the suggestion so made. There can be no pretense that any step was taken pursuant to said act. If the act should be considered as affecting the questions in this case it should probably be in the implication thereby, of the legislative determination that without the act no power existed to require the removal of such buildings.

In our opinion the circuit court erred in its finding and judgment, and the appellant's motion for a new trial should have been granted.

The judgment is reversed.

Filed Sept. 27, 1894; petition for a rehearing overruled Dec. 20, 1894.

 No. 17,087.

THALLS ET AL. v. SMITH.

MORTGAGE.—*By Husband and Wife on Land Held by Entireties.*—*Subsequent Acquisition of Title to Whole by Husband.*—*Lien of Mortgage.*—*Divestment of.*—If at the time a husband and wife executed a warranty mortgage on certain land, to secure the husband's debt, they held it as tenants by entireties, of which fact the mortgagee was ignorant, and believed the title to be in the husband, but subsequently the husband acquires title to the whole of the land described in the mortgage, such mortgage became a binding lien on the land, and he can not divest such lien by a subsequent conveyance.

From the Huntington Circuit Court.

M. L. Spencer and *W. A. Branyan*, for appellants.

C. W. Watkins, for appellee.

Thalls et al. v. Smith.

COFFEY, C. J.—This was an action by the appellee, Jane A. Smith, against the appellant Mary E. Thalls, and others, to foreclose a mortgage. The mortgage was executed by the appellant, Mary E. Thalls and her husband Samuel Thalls, to the appellee on the 28th day of July, 1884, to secure a promissory note of that date, executed by the said Samuel Thalls to the appellee. At the time of the execution of the mortgage, the real estate therein described was held by the appellant and her husband as tenants by entirety, but of this fact the appellee was ignorant, believing the title to be in Samuel Thalls. The mortgage contains full covenants of warranty. On the 26th day of September, 1887, the appellant and her husband conveyed the land to M. L. Spencer, who, on the same day, conveyed it to Samuel Thalls.

On the 17th day of December, 1887, the appellant and her husband conveyed the land to James C. Branyan, who, on the same day, conveyed it to the appellant and her husband, to be held by them as tenants by entirety. Samuel Thalls departed this life, insolvent, before the commencement of this suit.

It is claimed by the appellant that the debt attempted to be secured by the mortgage in suit was the individual debt of her husband, Samuel Thalls, and that the mortgage is, therefore, void; while, on the other hand, it is claimed by the appellee that the appellant is estopped from denying the validity of the mortgage.

We do not stop to inquire whether the appellant could have made a successful defense against this mortgage had the title to the land therein described remained in her and her husband, for the reason that we are of the opinion that if she had such defense it was lost when the title vested in the husband alone.

Had this suit been instituted while the husband held

The State v. Hodgin.

the title it is very clear, we think, that neither he nor this appellant could have defeated a foreclosure on the ground that the mortgage was executed as surety for his debt. If such a defense could not have been made it is plain that he could not confer upon the appellant the right to make it by a subsequent conveyance.

If one who executes a warranty mortgage without title subsequently acquires the title such acquisition inures to the benefit of the mortgagee, and the mortgagor will be estopped from denying that he had title at the date of such mortgage. *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172; *Boone v. Armstrong*, 87 Ind. 168; *Curren v. Driver*, 33 Ind. 480.

When Samuel Thalls acquired the title to the land described in the mortgage in suit, such mortgage became a binding lien on the land and he could not divest such lien by a subsequent conveyance.

The circuit court did not err in entering a decree of foreclosure in this case.

Judgment affirmed.

DAILEY, J., took no part in the decision of this cause.
Filed Dec. 13, 1894.

No. 17,384.

THE STATE v. HODGIN.

APPEAL.—*Dismissal of.*—*Parties to Judgment or Proceeding not Parties to Appeal.*—*No Showing as to Absence of Interest of Omitted Parties.*—It is a rule of practice, which applies alike in civil and criminal cases, that the assignment of errors is the appellant's complaint on appeal, and that the burden rests upon him to present by it, in a comprehensive and intelligible manner, some ruling of the lower court claimed to be erroneous, and that the full names of the parties shall be stated; and this rule is not complied with without an

139	498
139	572
139	498
141	45
139	498
144	367
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154	364
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159	421

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affirmative showing as to the absence of interest in the appeal by those parties to the judgment or proceeding, who are not connected in the appeal, and under such state of the record the appeal will be dismissed.

From the Howard Circuit Court.

A. G. Smith, Attorney-General, *J. F. Pyke*, Prosecuting Attorney, and *C. Wolf*, for State.

J. C. Blackledge, *C. C. Shirley*, *B. C. Moon*, *M. Bell* and *W. C. Purdum*, for appellee.

HACKNEY, J.—The appellee and eight others were charged, by an indictment in five counts, with a conspiracy to commit personal violence upon the prosecuting witness.

The record contains the indictment, a verdict of not guilty, in the case entitled "The State of Indiana v. Leonard B. Hodgin *et al.*," and a judgment, under the same title, that "the defendant go hence."

The record next presents a bill of exceptions which, together with the order-book entry of its filing, is entitled, in the same form, as in a cause against all of the defendants. There is no recital in the bill, nor does it otherwise appear from the record, that the appellee severed in his defense or that he was arraigned, tried, acquitted or secured a dismissal independently of his co-defendants. It would appear, therefore, that two presumptions might arise from the record, namely, that there was a trial of all of the defendants and that some one defendant was acquitted. Whether the defendant acquitted was the appellee, Hodgin, we have no means of determining from the transcript. If he was not acquitted no appeal could be entertained, and the fact of acquittal must appear from the record. *State v. Hamilton*, 62 Ind. 409; *State v. Hollowell*, 91 Ind. 376; *State v. Spencer*, 92 Ind. 115.

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The only appellee brought into this court is the said Hodgin and the absence, in this appeal, of his codefendants is in no way accounted for. It is a rule of practice of long standing that the assignment of errors is the appellant's complaint on appeal, and the burden rests upon the appellant to present, by it, in a comprehensive and intelligible manner, some ruling of the lower court claimed to constitute error. Another and indispensable requirement of this rule is that the "full names of the parties" shall be stated. Rule VI, of this court; *Burke v. State*, 47 Ind. 528; *Darnall v. Hurt*, *Guar.*, 55 Ind. 275; *Thoma v. State*, 86 Ind. 182; *Calvert v. State*, 91 Ind. 473; *Snyder v. State, ex rel.*, 124 Ind. 335; *Braden v. Leibenguth*, 126 Ind. 336; *Gourley v. Embree*, 137 Ind. 82; R. S. 1894, section 647; R. S. 1881, section 635.

The rule applies alike in criminal and civil cases, *Sturm v. State*, 74 Ind. 278, and it is not complied with without an affirmative showing as to the absence of interest in the appeal by those parties to the judgment or proceeding, who are not connected in the appeal. *Gourley v. Embree, supra*.

The rule has not been complied with by the appellant and, as notice of the insufficiency of the record has been brought to the appellant by the brief of the appellee and an opportunity has been given to correct the record, if possible, we have no course but to dismiss the appeal, which is accordingly done.

Filed Dec. 12, 1894.

Metzger v. Huntington, Trustee.

No. 17,056.

METZGER v. HUNTINGTON, TRUSTEE.

139 501
142 504

AGENCY.—Authority of Agent.—Ratification.—Party Dealing With One Assuming to be Agent Put on Inquiry as to His Authority.—Adverse Interest of Agent.—Conveyance.—Deed.—Assumption Clause.—Real Estate.—Pleading.—Defects Not Cured.—L. and W. entered into a contract with H., December 14, 1887, by which they agreed to purchase certain land of H. for \$45,000. L. and W. were to execute mortgages on the several lots into which the land was to be platted, which were to be first liens on the several lots, the mortgages to bear date January 1, 1888, L. and W. agreeing to assume these mortgages as a part of the purchase-price, and agreeing to expend \$8,000 in one year, in platting and improving the tract, etc., H. to furnish them a deed and take the mortgages, as agreed to, as soon as the plat was recorded and the improvements made. L., desiring to dispose of his interest, employed W. to procure a purchaser. W. sold L.'s interest for \$12,500, to M., June 9, 1888. June 11, 1888, L. sold his contract with M. to W. On October 20, 1888, by agreement among H., L. and W., M. not being present, H. made a deed for all the land to J., acting as third party, or go-between. J. executed and acknowledged the plat, and then executed to L. notes for \$45,000, with specific mortgages on the several lots. L. indorsed the notes to H., and J. also executed a deed to W. for the whole tract, which contained the clause: "Subject, however, to mortgages bearing even date herewith, * * aggregating \$45,000 of principal, which the second party assumes and agrees to pay." W. executed a deed to M. for an undivided one-half of the plat (the relation existing between W. and M. being that of tenants in common, and not that of partners), with assumption clause as follows: "Subject to incumbrance by mortgage of even date herewith, aggregating \$43,650 and accrued interest, * * which the second party assumes and agrees to pay as his interest proportionately appears," which deed W. placed on record and notified M. thereof, M. never having seen the deed, and not knowing that it was to come from W., as his contract was with L., and having no knowledge that the deed contained the assumption clause. M. from time to time sent to W. his proportion of the expense of improving the property, also money to pay his share of the interest on the mortgage debt, and his taxes, and joined with W. in making deeds for three lots. In February, 1890, H. notified M. that the interest being unpaid the whole debt had become due, and also drew his attention to the assumption clause in his deed from W., which was the first intimation M. had of such clause fixing his personal liability for the debt, believing he had bought the property subject simply to the mortgage debt. H. brings suit against M. on the assumption clause.

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Held, that W. could not, in his own interests, make a deed to M. placing a heavy obligation upon M. in so doing, and then, as agent for M., accept the deed, with its obligation, putting the whole on record without M. ever seeing the deed or knowing its contents.

Held, also, that the interests of W. were so opposed to M.'s, in this transaction, that H. was put upon inquiry to know that M. had really agreed to the assumption of the debt, and that so momentous a matter should not have been left dependent on a statement of W., whose own interests in it were so great.

Held, also, that if W. were a general or special agent of M. in the care and management of their property, which does not appear from the facts pleaded, still that would not be enough, especially in view of the adverse interests of W., to warrant H. to take it for granted that W. was vested with the extraordinary power to assume (in M.'s name, and so as to bind him) the personal obligation to pay a debt of \$25,000.

Held, also, that as there are no facts pleaded showing that W. was M.'s agent for any purpose, much less that he had authority to insert the assumption clause in the deed, and no facts from which such authority could be inferred, the verdict finding the fact of agency can not cure the pleadings in this respect.

Held, that ratification, like agency itself, must be clearly and affirmatively established by him who relies upon agency or ratification for the enforcement of his claim.

Held, that M.'s claim of ownership of the property, his joinder in execution of deeds for lots, and his payment of his part of expenses, taxes, and interest, did not amount to ratification of the assumption clause, and were not incompatible with his title as tenant in common by a deed conveying the lands subject to the mortgages, none of which were done after he learned of the assumption clause in the deed, but which assumption clause he repudiated as soon as he learned of its existence, and reconveyed the property to W., abandoning about \$17,000 which he had invested in it.

Opinion on petition for rehearing by HOWARD, J.

From the Miami Circuit Court.

A. G. Smith, W. A. Ketcham, L. H. Bisbee, Q. A. Myers, S. T. McConnell, A. G. Jenkins and J. C. Nelson, for appellant.

D. D. Dykeman, W. T. Wilson, G. C. Taber, M. Winfield, J. Mitchell, L. O. Bailey and J. Taber, for appellee.

HOWARD, J.—On the 14th day of December, 1887, the appellee, acting for himself and the other heirs of Jonas

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Huntington, deceased, entered into a contract with Frank E. Little and Lawrence H. Wilson, according to the terms of which Little and Wilson were to purchase of appellee about two hundred acres of land, situated on Wayzata Bay, Lake Minnetonka, in the State of Minnesota, for the sum of fifty thousand dollars. This land was to be platted into lots, four of which were to be retained by appellee, for which five thousand dollars were to be allowed as part payment of the purchase-price, leaving forty-five thousand dollars due. The forty-five thousand dollars were to be distributed as first mortgage liens on the several lots into which the ground should be platted, the mortgages to bear date January 1, 1888, to be due and payable in five years from date, except the sum of five thousand dollars which was to be payable in one year from date. Little and Wilson agreed to assume these mortgages as a part of the purchase-price. They also agreed to expend within one year eight thousand dollars in the platting and improving of the tract, and to pay certain claims already due for work upon the ground, not to exceed eighteen hundred dollars. As soon as the plat was recorded and the improvements made, the appellee was to furnish them a deed and take the specific mortgages, as agreed to.

Little and Wilson took possession under the contract, and began the improvements. According to the terms of the contract, it would seem that they were tenants in common, and not partners, and it appears from the record that this cause finally proceeded upon that theory, although the partnership theory was at first also suggested.

About June 1, 1888, Little desired to sell his interest, and employed Wilson to procure a purchaser. Wilson had done business for Hardy & Metzger, of Logansport, Indiana, manufacturers of linseed oil, and went to

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Logansport where he succeeded in selling Little's interest to William G. Metzger, the appellant, for twelve thousand five hundred dollars. Little paid Wilson five hundred dollars for this service. Little's contract with Metzger was dated June 9th; on June 11th Little sold this contract to Wilson for ten thousand five hundred dollars and one of the lots. On July 24, 1888, Wilson assigned the Metzger contract to one Cotton as collateral security on a loan. It does not appear that Metzger knew of either of these assignments.

Metzger at first paid five hundred dollars on his contract, afterwards sending six thousand, and finally, about the first of October, the remaining six thousand. On making the last payment, he received back his contract, and tore it up. Afterwards, on learning from Wilson that his deed for the Little interest was executed and on record, he destroyed his duplicate of the same contract.

On October 20, 1888, by agreement of Huntington, Little and Wilson, Metzger not being present, Huntington made a deed for all the land to one Johnson, acting as third party, or go between. Johnson executed and acknowledged the plat, to be known as Arlington Hights, and then executed to Little notes for the forty-five thousand dollars, with specific mortgages on the several lots. The notes were indorsed by Little to Huntington. Johnson also executed a deed to Wilson for the whole tract. In this deed was inserted the following clause: "Subject, however, to mortgages bearing even date herewith, and recorded this day in the office of the register of deeds in and for said county, aggregating forty-five thousand dollars of principal, which the second party assumes and agrees to pay." Wilson likewise executed a deed to Metzger for an undivided one-half of the plat, in which was also inserted an assumption clause,

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as follows: "Subject to incumbrance by mortgage of even date herewith, aggregating the sum of forty-three thousand six hundred and fifty dollars, and accrued interest thereon from January 1, 1888, which the second party assumes and agrees to pay as his interest proportionately appears." All the deeds, mortgages, and the plat were placed on record the same day, except Wilson's deed to Metzger, which Wilson retained until October 22, that he might in his own name make deeds for certain lots, after which he placed Metzger's deed also on record, and notified Metzger that this was done. Metzger did not see the deed, and it does not appear that he knew that the deed was to come to him from Wilson, as his contract was with Little. Huntington was present and approved all deeds and other papers.

Metzger from time to time sent to Wilson his proportion of the expense of improving the property, also money to pay his share of interest on the mortgage debt, and his taxes.

On December 31, 1888, Wilson voluntarily, for reasons which do not appear, executed another deed to Metzger, being substantially the same as that made October 20, and placed it on record also without sending it to Metzger.

Metzger joined with Wilson in making deeds for three lots sold. The enterprise proved a failure, and the interest for January, 1890, was not paid. In February, 1890, Huntington notified Metzger that the interest being unpaid the whole debt had become due, and also drew his attention to the assumption clause in his deed from Wilson. Metzger claims that this was the first intimation received by him that he was in any way personally liable for the debt, and that up to that time he believed that he had bought the property subject simply to the mortgage debt, and that he might at any time

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abandon the enterprise, losing only what he had invested, being then about seventeen thousand dollars.

On May 13, 1890, Metzger made a deed back to Wilson for his interest in the property, reciting that the deed was intended to reinvest in Wilson the lands conveyed by Wilson to Metzger under dates of October 20 and December 31, 1888, stating that said deeds were never delivered to him but were placed on record without his knowledge or consent; that he never assumed or agreed to assume the payment of any liens on said lands; that he never authorized the execution of any such deeds, and never accepted the same nor authorized the making of such deeds.

This suit was begun May 16, 1890, by Huntington against Metzger and Wilson, in the Cass Circuit Court, and on June 13, 1890, a verdict was found in favor of Metzger. On the granting of a new trial the venue was changed to Miami county, where a verdict was rendered against Metzger for twenty-six thousand dollars. The jury also returned answers to certain interrogatories. The only parties to this appeal are Metzger and Huntington.

The action was personal against Metzger upon the assumption clause in the deed from Wilson. The complaint was in six paragraphs. The first and fifth paragraphs were based upon the theory that Metzger and Wilson were partners. This theory, however, seems to have been abandoned. The fourth and sixth paragraphs count upon the deed of December 31 as well as upon that of October 20, but the deed of December 31st was not finally considered, and the verdict rested upon the deed of October 20, 1888. The second and third paragraphs, upon which the case was therefore tried, are based upon the assumption clause in the deed of October

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20, 1888. Copies of all deeds, mortgages and notes are made exhibits to the complaint.

A verified answer was filed in seven paragraphs, the first being a general denial; the second, a plea of want of consideration; the third, payment; the fourth and fifth, confession and avoidance; and the sixth and seventh, *non est factum*.

A reply followed in general denial to the second, third, fourth and fifth paragraphs of the answer; also special pleas to the fourth and fifth paragraphs. To the special pleas, being the second and third paragraphs of the reply, demurrers were overruled.

The points discussed in the briefs of counsel are:

1. The sufficiency of the evidence to sustain the judgment.
2. The sufficiency of the special paragraphs of the reply, to which demurrers were overruled.
3. The correctness of the court's ruling in the giving and refusing of instructions.

The real question underlying all these discussions is whether Wilson, in the making of the deeds in question and particularly in the placing of the assumption clause in his own deed to Metzger, was acting as Metzger's agent; and, if he was not such agent, whether Metzger ever ratified the placing of such clause in said deed.

In the fifth paragraph of his answer, which is substantially the same as the fourth, the appellant Metzger specifically and in detail denied such agency or ratification; and averred that his only contract in relation to said lands was made with Frank E. Little, in which, through Wilson, as Little's agent, he purchased Little's interest subject to the mortgages, but without any assumption of payment; that he never saw the deeds, and had no notice or knowledge of the clauses of assumption therein until some time in February or March, 1890,

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when appellee's attorneys made it known to him and demanded payment of the principal and interest of said mortgages; that after so learning of said assumption clause in said deed to him, he at once repudiated the deed, and conveyed the real estate back to Wilson; that he had no knowledge that Little had assigned to Wilson his contract; that he paid said purchase-money due said Little from him to said Wilson as the agent of Little, and in so doing believed, in good faith, that Wilson was the agent of Little, and that a payment to Wilson, the agent, was a payment to Little as principal.

To this answer the appellee filed his third paragraph of reply, which is substantially the same as the second paragraph.

It is to be learned from the reply that the appellee, William W. Huntington, contracted with Little and Wilson to sell the land subject to mortgages, aggregating \$45,000; that Little and Wilson "assumed these mortgages as part of the purchase-price," and that a deed should be given them as soon as the ground was platted, so that mortgage liens could be placed separately, "creating specific liens upon said lots"; that after Little and Wilson entered into possession "the said Little sold his interest, about June 1, 1888, to the defendant, William G. Metzger," the terms of the sale being unknown to the appellee; that the appellee "was advised by said Little and Wilson that the said Metzger had succeeded to the rights of said Little under said contract for the sale of said lands, and on the representation that the said Metzger was financially responsible, the plaintiff (appellee) accepted said Metzger in lieu of said Little"; that Metzger contributed his share towards the improvement of the lots; that Metzger came to Minneapolis and saw the land, and that he was advised by Wilson from time to time of everything that was being done and the expense

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thereof; that Metzger and Wilson purchased said lands with the intention of placing the same upon the market, each to bear one-half the expense and to share one-half the profits; that Metzger resided in Indiana and Wilson in Minneapolis, and Wilson was in possession of the lands for himself and Metzger, and was making the improvements with the knowledge and consent of Metzger, who urged the completion of the work and the procuring of the deeds; that by October 20, 1888, eight thousand dollars had been spent upon the improvements, and Wilson informed appellee that they were ready to close the contract but requested that the whole forty-five thousand dollars be made payable in five years instead of five thousand in one year; that Wilson "further informed the plaintiff (appellee) that as the defendant, Metzger, was with him in the contract, and was a man of large means, and would assume the payment of the notes and mortgages, this would make them perfectly secure;" that Wilson also informed him that one Johnson had been selected as the man to whom the deed should be made by appellee; that deeds were prepared for execution, one from Johnson to Wilson, containing an assumption of the notes and mortgages, and one from Wilson to Metzger for an undivided one-half, also containing an assumption of said notes and mortgages; that the appellee "examined said deeds and saw that each contained the assumpsit clause," and was satisfied therewith and so informed Wilson, and that said clause was discussed by Wilson and appellee, and the legal effect thereof considered; that "the plaintiff (appellee) at the time was fully advised as to all the facts herein set out, and knew that Metzger and Wilson had been in possession of said property since June, 1888;" that on the 20th day of October, 1888, said deeds were executed concurrently, and at the same time said plat, notes, and mortgages; that "all of

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said papers were left, in the presence of plaintiff, at the office of the register of deeds;" that "it was in reliance upon said assumpsits by said Metzger and Wilson, contained in said deeds, that the plaintiff and the other heirs of the said Jonas Huntington, deceased, acting through him, parted with their title to said lands;" that immediately after the execution of said deeds Metzger claimed title to said lands, and joined with Wilson in the execution of deeds for certain of the lots; that "the plaintiff, still believing that the said Wilson was acting for himself and said Metzger in the closing of said contract of the 20th of October, 1888, allowed the subsequent sale of said lots to take place;" that Metzger was advised by Wilson, in October, 1888, that the deeds had been executed and recorded, "and while said Metzger lived in Indiana, he left the entire charge of said property to said Wilson, and knew that said land had been conveyed to him by deed duly recorded, and while he knew that he did not make the bargain himself, he knew that it had been made by some one in his behalf; and the plaintiff avers that said Metzger was not present in Minneapolis in person, or by any other agent except Wilson on the 20th day of October, 1888, when said deeds were executed and recorded, and that with full knowledge of all said facts said Metzger claimed title to said land and sold and conveyed lots."

The acts of Huntington, Little, and Wilson in relation to the property are very fully alleged in the reply, but the suit is upon Metzger's assumption of indebtedness to Huntington, and there is a total absence of allegation as to Metzger's having directly made or ratified such assumption. Neither is it directly alleged that Wilson, or any one else, was Metzger's agent in the making of such assumption. If such agency existed, or if such ratifica-

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tion ever took place, we can learn that fact from the reply only by way of inference from other facts alleged.

The reply shows that Little and Wilson assumed the debt to Huntington in their contract with him; but no assignment or transfer of this contract to Metzger is shown. In his answer Metzger set up a contract with Little, according to the terms of which he purchased from Little "an undivided one-half interest in that tract of land * * * which is to be known as 'Arlington Hights,' Lake Minnetonka," on certain conditions, among them, "said conveyance to be made subject to specific mortgages on lots when said tract is platted, aggregating the sum of forty-four thousand seven hundred dollars;" but no assumption of the debt being stated.

Of this sale by Little to Metzger the reply states: "The said Little sold his interest about June 1, 1888, to the defendant, William G. Metzger"; adding, after stating that Little's contract to Metzger has been destroyed: "That the plaintiff was advised by said Little and Wilson that the said Metzger had succeeded to the rights of said Little under said contract for the sale of said lands, and on the representation that the said Metzger was financially responsible, the plaintiff accepted said Metzger in lieu of said Little."

It will be observed that the reply simply states that "Little sold his interest" to Metzger. There is no suggestion in this that Metzger took an assignment of Little's contract with Huntington, and none that Metzger had assumed any obligation to Huntington. That Little and Wilson should have informed Huntington that Metzger had succeeded to the rights of Little under the contract amounts to nothing. Metzger could not be bound by what Little and Wilson said to Huntington.

Indeed, the reply at this point shows laches on the

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part of Huntington. He says that Little sold to Metzger about June 1, 1888, and that Little and Wilson then told him that Metzger succeeded to Little under the contract. While this information could not bind Metzger, it did put Huntington on inquiry. The deed containing the assumption clause sued on was not made until October 20, 1888. During this period of more than four months and a half, Huntington should have learned from Metzger himself whether the information given by Little and Wilson was correct. He should not—on October 20 thereafter, in the absence of Metzger, and without having learned from him in writing, or orally when Metzger visited Minneapolis, whether he had taken upon himself the personal obligation to pay so large a debt—have joined with Little, Wilson and the stranger Johnson in loading upon Metzger an assumption of twenty-five thousand dollars' indebtedness. What Huntington was informed, what he believed, what he relied upon, does not count. He should have learned as a fact whether Metzger had assumed the payment of this debt. Not only was the information given by Little and Wilson over four months and a half before the deeds were made, sufficient to put Huntington upon inquiry, but so also was the large amount involved. Whether Metzger bought this land simply subject to mortgages aggregating forty-five thousand dollars, or whether he also assumed personal responsibility for the payment of the mortgages, should not be left a doubtful question. That doubt can not be resolved against Metzger in the absence of some facts to show assumption by himself or agent, or at least to show ratification if done without authority.

The facts relied upon to show that Wilson, in inserting the assumption clause in the deed, was acting as Metzger's agent are, that Wilson was in possession of the lands with the knowledge and consent of Metzger,

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and was engaged in platting and improving the land, of which Metzger was advised from time to time, and that he contributed his share of the expenses; that Metzger was in Minneapolis before the deeds were made and saw the land; that Metzger and Wilson bought the land with the sole purpose of platting and selling the same, each bearing one-half the expenses, and to share one-half the profits; that Wilson advertised lots for sale, and sold several lots; and that Metzger urged Wilson to complete the plat and improvements as soon as possible, and procure the deeds to the land.

It is not claimed that Metzger and Wilson were partners. Certainly then all the acts stated were acts that Wilson might do as tenant in common, owner of the undivided one-half of the land, and in possession. It is true that a tenant in common may act as agent for the other owners; but his being a tenant in common and in possession does not of itself make him agent to incumber his cotenants' interests, still less to impose a personal obligation upon them. There is no such implied agency. *Mechem Agency*, section 71; *Thompson v. Bowman*, 73 U. S. (6 Wall.) 316.

But there is another reason why Wilson could not be Metzger's agent in the assumption of the debt. His interests in the transaction were opposed to those of Metzger. It is averred in the reply, that Wilson "informed the plaintiff that as the defendant, Metzger, was with him in the contract, and was a man of large means, and would assume the payment of the notes and mortgages, this would make them perfectly secure." Then the deeds are described as, "one from Johnson to him, Wilson, for the lots in said plat, containing an assumption of the notes and mortgages; one from said Wilson to the defendant, Metzger, for an undivided half of said

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lots, also containing an assumption of said notes and mortgages * * *; that this plaintiff examined said deeds, and saw that each contained the assumpsit clause assuming to pay the purchase price as provided by the contract, and was satisfied therewith, and so informed said Wilson, and that the assumpsit clause was discussed by Wilson and himself, and the legal effect thereof considered." That is, Huntington and Wilson, considering and understanding the legal effect of the assumption clause, in the absence of, and without the knowledge of, Metzger, so framed the deeds that the obligation, which rested wholly upon Wilson by virtue of his contract with Huntington, and the deed from Johnson, should be shifted one-half from Wilson's shoulders to those of Metzger. Not only Huntington, but Wilson also, was directly interested in placing this obligation upon Metzger. Wilson therefore could not, in his own interests, make a deed to Metzger, placing a heavy obligation upon Metzger in so doing, and then, as agent for Metzger, accept that deed, with its obligation, putting the whole on record without Metzger ever seeing the deed or knowing its contents.

As said in *Mechem on Agency*, section 713, "The principal may, if he sees fit, intrust his interests in the hands of an agent whom he knows to also have an interest in the same transaction which is or may be adverse to his own. But this is not to be presumed, and it must appear that the interest of the agent was fully and fairly disclosed to the principal." See, also, *Michoud v. Girod*, 45 U. S. (4 How.) 502, and *Wardell v. Railroad Co.*, 103 U. S. 651.

Indeed, the duty of Wilson to Metzger, if he were his agent, was in this transaction so opposed to Wilson's interest to himself, that Huntington was again put upon inquiry to know that Metzger had really agreed to this

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assumption of debt. It appears from the reply, that Huntington and Wilson discussed the nature and effect of the assumption clause, and Huntington was assured that Metzger would agree to it. So momentous a matter should not have been left dependent on a statement by a third party whose own interests in it were so great as those of Wilson.

“Every person” (says Mechem Agency, section 706), “dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent’s authority. The very fact that the agent assumes to exercise a delegated power, is sufficient to put the person dealing with him upon his guard, to satisfy himself that the agent really possesses the pretended power. If, having relied upon it, he seeks to hold the alleged principal responsible, he must be prepared to prove, if either be denied, not only that the agency existed, but that the agent had the authority which he exercised.”

And, in section 276, of the same authority, it is said: “Persons dealing with an assumed agent therefore, whether the assumed agency be a general or special one, are bound at their peril, to ascertain not only the fact of the agency but the extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.” See, also, *Davis v. Talbot*, 137 Ind. 235, and authorities there cited.

Even, therefore, if Wilson were a general or special agent of Metzger, in the care and management of their property, which we think does not appear from the facts pleaded, still that would not be enough, especially in view of the adverse interest of Wilson, to warrant Huntington to take it for granted that Wilson was vested with the extraordinary power to assume in Metzger’s name, and so as to bind him, the personal obligation to pay a debt of twenty-five thousand dollars.

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The allegations relied upon to show that Metzger ratified the deed as made with the assumption clause, are that Metzger claimed ownership of the property, executed deeds for lots, sent money to pay his part of expenses, taxes, and interest. None of these acts, however, are incompatible with the title of Metzger as tenant in common by a deed conveying the lands subject to the mortgages.

It is not alleged in the reply that he did any of these things after learning of the existence of the assumption clause in the deed; but it is said that before he reconveyed the land to Wilson he knew that the appellee was relying upon the assumpsit. The reliance which appellee may have had upon the assumpsit could have no force to make effective an assumption which Metzger never made or ratified, and which he repudiated as soon as he learned of its existence by reconveying the property, and also abandoning upwards of seventeen thousand dollars which he had invested in it. Ratification, like agency itself, must be clearly and affirmatively established by him who relies upon agency or ratification for the enforcement of his claim. *Robinson v. Anderson*, 106 Ind. 152; *Runyon v. Snell*, 116 Ind. 164.

But appellee, tacitly admitting that agency is not well pleaded, contends that the verdict finding the fact of agency cures the weakness of the reply in this respect; and authorities are quoted to sustain this contention. It is true that a pleading in which all the essential facts are pleaded, but pleaded imperfectly, will be cured by a verdict finding the facts. But such is not this case. There is no allegation that Wilson was Metzger's agent for any purpose, still less that he had authority to insert the assumption clause in the deed; and no facts are pleaded, as we have seen, from which such agency or authority could be inferred.

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We might say, besides, that voluminous as is the record, we think it contains no evidence sufficient to sustain the verdict of the jury finding the fact of agency. That, however, is not a question upon which we think it necessary that we should enter, as is true, also, of other questions ably discussed by counsel. We are satisfied that the replies are insufficient, and that they are not cured by the verdict; and this conclusion must result in a reversal of the judgment.

The judgment is reversed, with instructions to sustain the demurrers to the second and third paragraphs of the reply, and for further proceedings.

Filed June 22, 1894.

ON PETITION FOR A REHEARING.

HOWARD, J.—In their petition and briefs for a rehearing, counsel for appellee have displayed much earnestness in argument, even pushing their zeal to the utmost verge of a proper discussion of the case. It would seem that the briefs might well have been devoted exclusively to the discussion of questions presented in the record.

Because the court has been unable to reach the conclusion reached by counsel, it is intimated that we have not considered appellee's side of the case. The sum of this contention is that because the court does not see the record as counsel see it, therefore the court does not see it as it is. We are, however, of opinion that our own vision should guide us, and inasmuch as we are unable to use appellee's glasses, we must be content to make use of our own in looking through the record.

To counsel, the record seems to show that appellee is entitled to recover from appellant a large sum of money. To the court, it is apparent from the same record that an outrage was attempted upon appellant; that, whether by

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fraudulent design or by an unfortunate chapter of accidents, an unconscionable obligation was sought to be thrust upon him without his knowledge or consent.

In appellee's additional brief, *Barrett v. Lewis*, 106 Ind. 120, and *Otis v. Gregory*, 111 Ind. 504, are cited to show that the substance, rather than the forms, of a transaction are to be regarded in adjudicating the rights of parties. This is a sound and equitable rule, and peculiarly applicable to the case before us.

Regarding, therefore, the substance of the pleadings in this action, which were considered in the original opinion, and upon which the case was tried and the decision rendered, we find that the complaint presents a *prima facie* case in favor of the appellee. A deed is shown from Wilson to Metzger, duly recorded, and containing a clause in which the payment of a mortgage debt due appellee is assumed. Acts from which an acceptance by Metzger of said deed may be inferred are also alleged.

The answers admit this deed and its record, and that it contains the assumption clause, but deny that the clause was inserted with Metzger's consent or knowledge, or that its insertion was ever ratified by him. This certainly was in substance a plea in confession and avoidance.

The replies set up the facts in detail, showing all the transactions from the first contract of appellee with Wilson and Little until the bringing of the suit against Metzger upon the assumption clause. The facts so detailed do not show that Metzger ever authorized or knew of the insertion of the assumption clause, or that he ever ratified it. The demurrers to the replies should, therefore, have been sustained. Otherwise a personal debt may be imposed upon an individual without his knowledge

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or consent, a proposition abhorrent to the plainest principles of justice.

But, while counsel do not any longer seriously argue that the replies are good in themselves, yet it is said that the jury found that in the making of the deed from Wilson to Metzger, and in the accepting of that deed, with its assumption clause, Wilson was Metzger's agent; that, therefore, the replies, as thus cured by the verdict, show that Metzger, through Wilson, his agent, did have knowledge of the assumption clause, and did accept the deed containing it.

Agency is a conclusion of fact, to be established by direct proof or by the attendant circumstances. *Columbus, etc., R. W. Co. v. Powell, Admr.*, 40 Ind. 37; *Isbell v. Brinkman*, 70 Ind. 118; *Indiana, etc., R. W. Co. v. Anderson*, 114 Ind. 282.

It is not claimed that there is in this case any direct proof that Metzger ever appointed Wilson his agent. The appointment, if made, can be made known to us only by inferences from facts shown. If, therefore, the particular facts and circumstances found are not consistent with the fact of agency, then the mere conclusion of the jury, that one was the agent of another, falls unsupported to the ground.

Undoubtedly, the jury were of opinion, and correctly so, as said in Story on Agency, section 2, that, in general, "whatever a man *sui juris* may do of himself, he may do by another; and, as a correlative of the maxim that what is done by another is to be deemed done by the party himself."

So here, if the jury concluded from the circumstances detailed in the record that Wilson was Metzger's agent, then they might further conclude that what Wilson did in the premises, was done by Metzger.

Hence the question, first of all, to decide is, whether,

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in fact, Wilson was Metzger's agent for the purpose of making the assumption clause in the deed. If he was such agent, then the conclusion of the jury was correct; if he was not, then the whole fabric, built up on the theory of such agency, tumbles to the ground.

The definition of an agent at the common law, as quoted in Story on Agency, section 3, is: "An attorney is he who is appointed to do anything in the place of another."

The appointment need not be in writing. It may be inferred from the words or acts of the principal. These words or acts must, however, be such as point clearly to the agent as such.

In Evans on Agency (Ewell's ed.), the definition given is: "An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified." This definition is adopted in 1 Am. and Eng. Encyc. of Law, 333.

It will be noticed that the agent must be duly appointed, or his act must be duly ratified. It is not enough that the jury find that Wilson was Metzger's agent. The other facts found must be such as to allow the inference that he was duly appointed, or, at least, that his acts were duly ratified. The jury can not be allowed to give us their unsupported, and even, as here, contradicted, conclusion, simply, that he was agent.

So, also, it is not enough to show that Metzger ratified and acted under the deed. It is necessary to show that, at the time of such ratification, he knew of the existence of the assumption clause in the deed, and that he ratified such assumption clause; unless, indeed, it should appear that the ratification of the deed was made with the intent to take all liability without such knowledge. Otherwise, all material circumstances must be made known to the principal. The act of the agent can not

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be ratified without knowledge of what the act was. And in this case, the ratification and acceptance of the deed could be only a ratification of what the principal knew was in the deed. 1 Am. and Eng. Encyc. of Law, 432, and cases cited.

In *Manning v. Gasharie*, 27 Ind. 399, where an agent was authorized to buy goods for cash only, it appeared that he had bought certain goods on credit. It was held that the acceptance and use of the goods by the principal would not be a ratification of the act of the agent, unless the fact of the purchase having been made on credit was known to the principal. See, also, *Davis v. Talbot*, *supra*, cited in the original opinion.

In the case at bar, in answer to interrogatories, the jury found that in the contract of sale to Metzger of Little's interest in the land, Wilson was Metzger's agent. But, in two other answers to interrogatories, just preceding, the jury also found, with reference to the same transaction, that Wilson was Little's agent. This contradiction shows that the jury had but a vague and confused idea of the meaning of the term agent. In numerous other answers, the jury, in finding the particular facts and circumstances of all the transactions, show clearly that Wilson could not be Metzger's agent.

Even if Wilson had authority to execute and deliver to Metzger a deed for the land, and also to accept that deed, all as Metzger's agent, an absurdity on the face of the statement, yet even such authority would not give to Wilson the right to insert in the deed a personal obligation on the part of Metzger to pay a lien upon the land. Only by a ratification of the transaction, with full knowledge of all the circumstances, including the contents of the deed, could the principal be bound by such unauthorized act of the agent.

We think it clearly appears from the record in this

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case, that Wilson was not Metzger's agent for any purpose, whether general or special. But even on appellee's theory, that by inference from the facts of the case it may be concluded that he was an agent for some purposes, yet it would not even then follow that he had a right, without Metzger's knowledge and consent, to insert a clause in a deed never seen by Metzger, by which Metzger became bound to pay to appellee the sum of \$25,000. Wilson might as well have signed Metzger's name to a promissory note for that amount, and turned it over to appellee. It is only when the agent acts within the scope of his authority that he can bind his principal; and those who deal with one who thus assumes to act for another, do so at their peril. *Osborn v. Storms*, 65 Ind. 321; *Love v. Payn*, 73 Ind. 80; *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63; *Robinson v. Anderson*, 106 Ind. 152.

In arguing that the evidence supports the finding of agency, acceptance, and ratification, counsel say that the jury "heard the cross-examination [of Metzger], and concluded, as it was their sole province to conclude, that he was not telling the truth." It is true that the jury have a right to reject evidence if they do not believe it to be true; but the question here is, not what evidence the jury may have disbelieved, but whether there was evidence to support the findings made by them. It will not do to explain away the evidence against the correctness of the findings; it is necessary to show some evidence in their favor.

The only evidence referred to by counsel which is claimed to directly support the findings as to Metzger's having knowledge that the payment of the mortgage debt was assumed in the deed to him from Wilson, is a fragmentary copy of a letter from Wilson to Metzger, said to have been written a few days after the date of the

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deed. That letter was so imperfect and illegible that it could not be read so as to make it intelligible; and it is seriously debated by counsel on both sides whether or not the fragments of such letter are in the record. And indeed, it is doubtful whether the fragment is in the record, or whether it is a part of the record for any purpose. Certainly it could make no sense if read to the jury, and at most could be given meaning only by the aid of parol evidence. Wilson and Metzger were both questioned as to its contents, and both testified that it contained no statement relating to Metzger's assuming any personal obligation to pay the mortgage debt. Surely then all this, the fragmentary writing, and the parol evidence in relation to it, constituted no evidence to the jury that Metzger had assumed the obligation.

Other items of evidence are cited in appellee's several briefs, from which it is argued that the jury might make inferences as to Metzger's knowledge of the assumption clause in the deed. None of this evidence, however, was of such a nature as to be inconsistent with Metzger's acceptance of the deed subject to the mortgage debt; and it is only by the utmost straining that such inference could be made. Agency, acceptance, ratification, these should be shown by the evidence, not guessed at by the jury. None of the evidence showed knowledge by Metzger of the assumption clause in the deed.

The petition for a rehearing is overruled.

Filed Dec. 14, 1894.

Trustees of Presbyterian Board of Publication, etc., v. Gilliford *et al.*

No. 16,852.

TRUSTEES OF THE PRESBYTERIAN BOARD OF PUBLICATION
AND SABBATH-SCHOOL WORK v. GILLIFORD ET AL.

GUARANTY.—*When a Continuing One.*—G. and P. entered into the following guaranty: "We hereby jointly and severally guarantee to the Presbyterian Board of Publication payment for all sales which may be made by them to Rev. William A. Patton, but our liability on this guaranty not to exceed, in any event, \$3,000."

Held, that the guaranty is a continuing one.

SAME.—*A Continuing One.—Limited Liability.*—A guaranty of payment for goods to be sold from time to time to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it; it being the extent of liability and not the extent of sales that is limited. Where the amount of the guarantor's liability is limited and the time is not, it will be held to be a continuing guaranty.

SAME.—*Additional Security.*—The fact that the obligee took additional security from the obligor did not lessen the obligation of the guarantors.

From the White Circuit Court.

E. B. Sellers and *W. E. Uhl*, for appellant.

J. H. Gould and *G. R. Eldridge*, for appellees.

HOWARD, J.—This was an action brought by the appellant upon a written guaranty, and to set aside an alleged fraudulent conveyance of real estate by one of the guarantors, also to subject the property so conveyed to the payment of appellant's debt.

In the amended complaint, it is alleged, among other things, that one William A. Patton obtained credit from the appellant in the purchase from time to time of such books, papers, periodicals and other publications as he might require, upon the following contract of guaranty entered into by the appellees George Gilliford and Joseph A. Patton, to wit:

"We hereby jointly and severally guarantee to the

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Presbyterian Board of Publication payment for all sales which may be made by them to Rev. William A. Patton, but our liability on this guaranty not to exceed, in any event, \$3,000."

Numerous answers were filed to the complaint, all of which were afterwards withdrawn, except the following, being the eighth paragraph of the joint answer of said guarantors:

"For a further answer to the said amended complaint these defendants admit the execution of the said written guaranty mentioned in the complaint, but they aver that the said plaintiff, after the execution thereof, and during the years 1881 and 1882, on the faith of the said written guaranty and under and pursuant to the terms thereof, sold and delivered to the said William A. Patton books and other goods, wares and merchandise of the value of \$3,000 and more, said sales being upon credit; that afterwards, in the year 1883, the said William A. Patton fully paid to the plaintiff all of said indebtedness for said sales; that by said sales as aforesaid made to the said William A. Patton in the years 1881 and 1882, these defendants became and were liable to the said plaintiff upon their written guaranty in the sum of \$3,000, and upon the payment thereof by the said William A. Patton, as aforesaid, these defendants became, and were, discharged from said indebtedness, and released from any further liability on said written guaranty; and these defendants further aver that after the payment of said indebtedness as aforesaid, and during the years 1884, 1885, 1886, 1887, 1888 and 1889 the said plaintiff sold and delivered to the said William A. Patton other goods, wares and merchandise of the value of \$8,000, of which these defendants had no notice or knowledge, prior to the commencement of this action, on the 12th day of November, 1890; that to secure the said plaintiff in the

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sales thus made to the said William A. Patton in the years 1884, 1885, 1886, 1887, 1888 and 1889, the plaintiff, on the 4th day of June, 1888, required the said William A. Patton to insure his life in a life insurance company in the sum of \$2,000, payable, after his death, to the said plaintiff, which the said William A. Patton did, and caused the said policy of insurance to be delivered to the plaintiff, and as a further security for said last named sales the said William A. Patton, his wife joining therein, on said 4th day of June, 1888, conveyed to the plaintiff certain real estate in the city of Indianapolis, of the value of \$3,000; and these defendants aver that the said indebtedness of the said William A. Patton, mentioned in the complaint, is for said goods, wares and merchandise so, as aforesaid, sold and delivered by the plaintiff to the said William A. Patton during the said years 1884, 1885, 1886, 1887, 1888 and 1889, and not otherwise.

"And these defendants further aver that the said plaintiff still holds and possesses the said life insurance policy and the said real estate so, as aforesaid, given and conveyed to secure the said plaintiff for the said sales made during the years 1884, 1885, 1886, 1887, 1888 and 1889."

To this paragraph of answer a demurrer was overruled by the court, and this ruling presents the only question for our decision.

From the complaint and the answer it appears that immediately after the contract of guaranty the appellant, having notified the guarantors of its acceptance of the the guaranty, began selling to William A. Patton books, periodicals and other publications on credit, and continued so to deal with him until the year 1889, at which time there was a balance due appellant of about \$1,600. The aggregate of sales amounted to something over \$10,-

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000, all of which was paid by William A. Patton except said balance, which remains unpaid, and for which suit was brought.

The question discussed on this appeal is as to the nature of the guaranty in suit.

Appellant contends that the guaranty is a continuing one, the guarantors being liable to the extent of three thousand dollars for any balance found due and unpaid by William A. Patton to appellant.

The appellees, on the contrary, contend that the instrument in suit is not a continuing guaranty, and that when goods to the amount of three thousand dollars had been sold on credit the guarantors were liable for all that remained due, and that when that was paid the guarantors were not further liable in any event.

In section 156 of his work on Suretyship and Guaranty, Mr. Brandt well says that "As the terms of guaranties, and the circumstances under which they are given, differ in almost every case, no definite rule for determining whether a guaranty shall be considered a continuing one or not can be given. The only way to illustrate the subject is to refer to facts of decided cases." Many such illustrations are given in the succeeding sections of that work, showing that the circumstances of the parties, as well as the words of the guaranty, are to be taken into consideration in determining whether the guaranty is continuing or noncontinuing as to amounts guaranteed, as to the time during which the guaranty shall remain good or as the extent of the liability of the guarantor.

In 9 Am. and Eng. Encyc. of Law, 77, the statement is made that "When by the terms of the guaranty it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, but

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when no time is fixed upon and nothing in the agreement indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time."

In the notes to the foregoing statement numerous authorities are cited, and many examples given of continuing and noncontinuing guaranties, amongst them the following:

"The bearer is going to start a peddling route to sell cigars and tobacco. He wishes to buy goods of your firm. We the undersigned will be his security to the amount of \$1,000." Held to be continuing. *Sickle v. Marsh*, 44 How. Prac. (N. Y.) 91.

An agreement to be responsible for the payment of all future bills or indebtedness of a third person to an amount not exceeding \$500, held to be continuing. *Estate of Bentz*, 38 Leg. Intel. (Pa.) 94.

A wrote to B that C wanted to place a stock of groceries in his store, and that to enable C to do this A was willing to be responsible to B "for the amount of groceries he may order of you." Held not continuing. *Knowlton v. Hersey*, 76 Me. 345.

A guaranty of payment for goods to be sold "from time to time" to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it. *Crittenden v. Fiske*, 46 Mich. 70.

WILLES, J., in *Heffield v. Meadows*, Law Rep. 4 Com. Pleas 595, held that for the purpose of seeing what the parties were dealing about, it is proper to ascertain what was the subject-matter which they had in view when the guaranty was given; "not for the purpose of altering the terms of the guaranty by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guaranty." This ruling was approved in *Brandt*

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on Suretyship and Guaranty, section 156. The contract of guaranty, as construed by the court, in *Mathews v. Phelps*, 61 Mich. 327, was as follows:

"It is hereby mutually agreed that William E. Moloney and Ralph Phelps, Jr., is to become the surety of Charles Savenac to James L. Mathews, for the sale of cigars, to the extent of two hundred dollars."

Savenac failed to return to Mathews money received by him on the sale of cigars to the amount of \$169.04. It also appeared that the sales made by Savenac for Mathews amounted to more than \$1,000; and counsel for the guarantors contended that the contract did not extend beyond the sale of \$200 worth of cigars, and was not continuous; that Mathews having received returns exceeding \$200 the guarantors were not liable.

Of this contention the court said: "This would be a narrow construction to place upon the terms of the contract. It is the extent of the liability, and not the extent of the sales, that is limited to \$200."

That case seems very much like the one now under consideration.

The court there held that the guaranty was intended to continue so long as Savenac sold cigars for Matthews, or until ended by notice from the guarantors; that under a fair construction of the contract the guarantors were liable for the proceeds of the sales, "such liability being limited to two hundred dollars."

The court held further in that case, that in construing a contract of guaranty, the general rule arising by implication from the language used is, that when the amount of the guarantor's liability is limited, and the time is not, it will be held to be a continuing guaranty.

A similar ruling was made by this court in the case of *Wright v. Griffith*, 121 Ind. 478, where Judge MITCHELL, Vol. 139—34

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speaking for the court said, that unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is to be limited, the guaranty will be regarded as continuing until it is revoked.

In the contract before us there is no limit expressed as to the amount of the sales or the time during which the guaranty should continue. Indeed the amount of sales guaranteed seems to be expressed as unlimited. Guaranty is expressly made of "payment for all sales which may be made." The only limitation named in the contract is as to the ultimate liability of the guarantors, and that is fixed at "not to exceed in any event \$3,000."

From the words of the contract, then, we must conclude that the guaranty is a continuing one, the liability of the guarantors being limited to \$3,000.

Neither are there any circumstances to be gathered from the complaint or the answer to show that a different construction from the plain meaning of the words should be given to the contract.

The very nature of the business tends to show that there was no limit intended as to the time when sales should cease, or as to the amounts of such sales. The appellant was engaged in publishing books and periodicals. William A. Patton desired to engage in selling those publications, purchasing supplies from appellant from time to time as his business should require. He continued in the business until he had purchased and disposed of more than ten thousand dollars worth of books and periodicals, making payments from time to time; and it does not appear that the guarantors during all these years expressed any intention of revoking their guaranty.

The answer states that the guarantors had no notice or knowledge of a large part of such sales. They had

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expressly guaranteed "payment for all sales" which might be made by appellant to William A. Patton. It was their duty either to revoke that guaranty or to see that William A. Patton continued to make payment for the goods purchased.

That appellant took additional security from Patton could not lessen the obligation of the guarantors. It was rather a favor to them, relieving them to that extent.

The judgment is reversed, with instructions to sustain the demurrer of appellant to the eighth paragraph of the joint answer of the appellees George Gilliford and Joseph A. Patton, and for further proceedings.

Filed Oct. 17, 1894; petition for a rehearing overruled Dec. 21, 1894.

No. 17,369.

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139	531
168	620
168	623
168	624

139	531
170	632

CRIMINAL LAW.—Consideration of Evidence on Appeal.—It is only where there is an absolute failure of the evidence to sustain the finding or verdict on some material point that the Supreme Court will interfere on that ground alone.

SAME.—Rape.—Consent.—Subjection of Will.—Outcry.—Physical Resistance.—Where a woman alights from a train at three o'clock in the morning, at a railroad station, and being compelled to wait some time for a train upon another road which will take her to her destination, inquires of a stranger for a hotel, who recommends one, and another stranger, the defendant, who is the driver of the only vehicle then at the station, overhearing the conversation, offers to take her to the hotel in his vehicle, which contains two other men, also strangers to her, and such defendant, after she enters his vehicle, instead of taking her to the hotel, fraudulently drives out of the town into a ravine in the woods, subjecting her to indignities on the way and causing her to fear for her life, at which she cries and begs to be let go, and in the ravine the defendant commands her to dismount and by force lays her upon the ground and has intercourse

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with her, against her will, after which, upon her attempting to arise, he profanely commands her to lay still and let the other men have intercourse with her, and she is then taken to a lumber yard and deserted, the defendant is guilty of rape, without proof of outcry or physical resistance.

SAME.—*Rape.—Instruction.—Overpowering Mind.*—An instruction that “consent, induced by fear of personal violence, is no consent, and though a man lay no hands on a woman, yet, if by an array of physical force he so overpowers her mind that she does not resist, he is guilty of rape by having the unlawful intercourse,” is not erroneous.

SAME.—*Rape.—Consent.—Force.—Fear.—Instructions.*—For other instructions given and refused, involving the matters of force, fear and consent, see the opinion.

SAME.—*Failure of Defendant to Testify.—Instruction Upon Must be Requested.*—The failure of the court to instruct the jury regarding their duty in a case where the defendant does not testify, is not error unless the defendant requests such an instruction.

From the Grant Circuit Court.

H. Brownlee and *H. J. Paulus*, for appellant.

A. G. Smith, Attorney-General, *O. L. Cline*, Prosecuting Attorney, and *C. M. Ratliff*, for State.

DAILEY, J.—This was a prosecution begun in the Grant Circuit Court, by the State of Indiana against the appellant, Mack Felton, by indictment, charging him with the commission of the crime of rape at said county, on the 10th day of September, 1893, upon the person of one Mollie Terrell.

Upon a plea of not guilty the cause was submitted to a jury for a trial in the court below, who found a verdict against the appellant, finding him guilty of the crime of rape, as charged in the indictment, and assessing his punishment at imprisonment in the State prison for five years. There was a judgment upon this verdict. Before the rendition of the judgment thereon, the appellant moved the court for a new trial, which motion was overruled, and to this ruling he properly saved an exception. From this judgment he prosecutes an appeal and assigns

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as error that the court erred in overruling his motion for a new trial.

Under the causes specified for a new trial, it is earnestly urged by the learned counsel for the appellant, that the evidence is entirely insufficient to sustain the conviction of the crime of rape, and that the verdict of the jury is, therefore, contrary to, and not sustained by, the evidence, and is, consequently, contrary to law.

The rule has long been settled in this court that in criminal as well as civil causes verdicts will not be disturbed merely on the weight of the evidence. When the evidence tends to sustain the verdict on every material point the court will not reverse the conclusion reached by the trial court and jury. *McCarty v. State*, 127 Ind. 223 (224).

It is only where there is an absolute failure of the evidence to sustain the finding or verdict on some material point that this court will interfere on that ground alone. *Murphy v. State*, 97 Ind. 579 (582); *Ard v. State*, 114 Ind. 542; *Wachstetter v. State*, 99 Ind. 290; *Hudson v. State*, 107 Ind. 372; *Ritter v. State*, 111 Ind. 324; *Trout v. State*, 111 Ind. 499; *Kleespies v. State*, 106 Ind. 383; *Dolke v. State*, 99 Ind. 229; *Clayton v. State*, 100 Ind. 201; *Garrett v. State*, 109 Ind. 527.

It is insisted:

First. That there is no evidence that the defendant accomplished his purpose by means of force either used or threatened.

Second. That the woman injured did not resist to the extent of her ability.

These two propositions are so closely related to each other that we may consider them together. A careful perusal of the evidence, as it appears in the record, bearing upon the question of force used by the appellant, and of resistance by her, reveals the fact that until the time

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of the occurrence in dispute, the appellant and the prosecuting witness were wholly unknown to each other. She was a resident of Kokomo, Indiana, but was returning home from the city of Muncie, where she had been on a visit to her husband, who was engaged in work at that place, and arrived at Marion, Indiana, at 3 o'clock in the morning, where she was compelled to remain for a time until she could secure a train for her destination. The woman was an entire stranger in the city, never having been there before; she had a valise in her hand, and was in need of assistance to a boarding house or hotel. She saw a Mr. Peters standing on the platform at the depot, and made her wants known to him, requesting his assistance to a private house where she could be entertained during the *interim* between trains. Peters recommended to her the "Spencer House" and promised to attend her to that place. There was no vehicle at the depot at the time, except an open topped, two-seated carriage, drawn by two horses and driven by the appellant. It was occupied by two men besides this defendant, all of whom were entire strangers to her. The appellant, Felton, was present on the platform when the conversation was had, and overheard what was said. He stepped up to Mrs. Terrell and informed her that she could ride with him, and he would drive her to the hotel. Peters then told him that if he would do so, it would be an accommodation to him, and requested her to go with the appellant. She entered the carriage with the defendant, under protest, upon his promise to take her to the hotel, and thereupon he drove it rapidly away. Instead of conveying her to the hotel, she was fraudulently driven with great speed to the woods south of the city into a ravine, in the darkness, where he stopped the team, laid a robe on the ground and had her dismount from the

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vehicle, after which he caught the woman by the shoulder and arm and laid her down.

After the defendant had accomplished his purpose, she attempted to get up, and he said: "By G-d, you lay still and let them have something to do with you," and she was thus compelled to remain prostrate until she also submitted to the lascivious embraces of his two confederates. When they had gratified their carnal desires, they placed her in the carriage and took her to a lumber yard where she was deserted and remained in fear during the residue of the night. In the morning, at about 5 o'clock, she appeared at a restaurant and called for a sandwich and a cup of coffee; complained of the headache and of the outrage that had been committed upon her, and was weeping at the time. She repeated her complaints to the coroner, to a policeman, and to the family with whom she was left for care and attention, and caused this prosecution to be instituted against the defendant for his crime.

It also appears that she was sick for five weeks after the transaction, thus indicating that she had suffered a severe mental and physical shock on account of the appellant's revolting conduct.

In addition to all this, it is shown by the record, that very soon after he started from the depot he caught her by the leg and made an indecent and insulting proposal to her, and told her of his design; that she begged him to have nothing to do with her, and to let her go, and cried constantly because of the indignities heaped upon her and for fear they would take her life. She was a small woman, in the presence of three able-bodied men, and doubtless apprehended great bodily harm from her assailants, who were abducting her from the city limits; although appellant said, at the time, that he had no intention of harming her. A declaration like this was not

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calculated to inspire confidence in the innocence of his motives, when it was refuted by conduct and declarations likely to produce an opposite effect. If the assurances of a party accused, to the prosecuting witness, are a more potent factor than his conduct, in determining the question of his guilt, then he may commit any heinous offense and afterwards come into court claiming the benefit of them, and thus escape the punishment.

It is insisted, by appellant's counsel, that the crime in this case is not proven, because the woman made no outcry. But it will be borne in mind that she was a person small in stature, away from home, in the hands of strangers, and in fear of great violence; that she saw no one to whom she could appeal for relief after they left the depot on the way to the woods where the act was perpetrated; and as the deed was committed in a grove at the edge of town, where there were no immediate habitations, a cry of distress would have been of little avail. Besides, in the terror of her situation, she may have thought the defendant would kill her before assistance could come if she made an outcry. Aside from this, an examination of the evidence satisfies us that she is not a person of ordinary intelligence, and she probably acted from the appearances as they at the time presented themselves to her mind. In the peril of her situation, surrounded by the influences that environed her, the courts can not split hairs in measuring the degree of resistance she was capable of making.

It is the theory of the State, fairly supported by the evidence, that the mind of the prosecuting witness was so overcome by the language and conduct of defendant and his two associates, and the surroundings, that she was unable to do more than was done to resist the assault, and hence the act of sexual intercourse was forcible and against her will. "The nature and extent of the

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resistance which ought reasonably to be expected in each particular case must necessarily depend very much upon the peculiar circumstances attending it, and hence it is quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance." *Anderson v. State*, 104 Ind. 467 (474); *Ledley v. State*, 4 Ind. 580; *Pomeroy v. State*, 94 Ind. 96; *Commonwealth v. McDonald*, 110 Mass. 405; 2 Bishop Crim. Law, section 1122.

In the case at bar, if the act of intercourse had been with the consent of the woman, it seems strange that the defendant discharged her at the lumber yard, an out of the way place, instead of taking her to the hotel as he promised to do. This of itself may have been a circumstance that had some weight with the jury in determining the question of the defendant's guilt.

It is not the law of this State that a woman assaulted with intent to commit a rape upon her is expected "to bite, if she has teeth; to kick, if she has feet; to scream, if she has a mouth; and to generally resist by all other violent means within her power." Such an instruction, in substance, was asked by the defendant in *Anderson v. State*, *supra*, and this court said: "The court had already instructed the jury that it was incumbent upon the State to show that the prosecuting witness had resisted with all the means within her power, and that was as far as the court was required to go under our decided cases, and others of recognized authority in this State."

In *Ledley v. State*, *supra*, the court said: "On the subject of resistance, a recent writer says, that if resistance is overcome by physical force, or her will overpowered by fear of death, or by duress, the crime is complete, though she ceased all resistance before the act itself was finally consummated. She parts with her virtue as a traveler with a pistol at his breast parts with his

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purse. In both cases the will is overpowered. It may be a voluntary muscular act, but not a free will act. They submit to their fate against their will, but voluntarily for fear of worse. Courts can not fastidiously expect every female to prefer death to violation, and her demeanor on such trying occasions, whether of tame submission or active resistance, is a circumstance for the jury to consider."

The case of *Eberhart v. State*, 134 Ind. 651 (654), cites Bishop on Crim. Law as follows: "Some of the cases, both old and modern, are quite too favorable to the ravishers of female virtue, and ought not to be followed, on this question of resistance. * * * The better judicial doctrine requires only that the case shall be one in which the woman 'did not consent.' Her resistance must not be mere pretense, but in good faith."

In *Huber v. State*, 126 Ind. 185, the court held that "The rule does not require that the woman shall do more than her age, strength, and the attendant circumstances make it reasonable for her to do in order to manifest her opposition." The better rule is that it is not necessary that a woman should use all the physical force she has in resistance, but it must be real, and must have been overcome by the force of the defendant. *State v. Shields*, 45 Conn. 256; *Commonwealth v. McDonald*, *supra*.

Under one of the causes assigned for a new trial, the appellant calls in question the action of the trial court in giving to the jury, of its own motion, instruction number four, as follows: "If you find from the evidence in this case that an act of sexual intercourse did take place between the defendant and prosecuting witness, Mollie Terrell, as averred in the indictment, the question whether or not the prosecuting witness voluntarily consented to such act is a question of fact for you to determine from the evidence in the case. The defendant,

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Felton, insists that the prosecuting witness, Mollie Terrell, voluntarily consented thereto, and that he used no force or coercion of a kind to compel such consent, but that she yielded to his desires at his request; while on the other hand the prosecution insists that she did not voluntarily consent, but that she was induced by fear of personal violence, and that by an array of physical force the defendant so overpowered her mind that she did not resist, and only yielded when her will was overpowered, and that if she finally submitted to her fate it was against her will and for fear of more serious consequences. You are to say from the evidence which, if either, is right, and if after giving due weight to all the evidence you find the prosecuting witness, Mollie Terrell, did voluntarily consent to such act of intercourse, and not under coercion, you should acquit; but if you find, beyond a reasonable doubt, that the act was by force, and against her will, and find the other facts averred in the indictment established beyond a reasonable doubt, you should convict."

This instruction is in the exact language of an instruction given and approved by this court in the case of *Anderson v. State*, *supra*, except that in the case at bar the words "by an array of physical force" are injected into it, and it is objected that there is no evidence to which the expression was applicable, and that it was calculated to mislead the jury.

Without again attempting to give a recital of the transaction as it occurred, we are of the opinion that the hypothesis submitted to the jury by this instruction was fairly applicable to the evidence. It will be observed that the court does not undertake to say what has been proven by either the State or the defense. The jury were left free to determine from the evidence which, if either, is right.

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We do not think, under all the evidence in the case, that the instruction either misled the jury or prejudiced the substantial rights of the defendant. *Graeter v. State*, 105 Ind. 271 (274).

Complaint is also made of the action of the court in giving instruction number 5, as follows: "On the subject of consent, the court instructs you that a consent induced by fear of personal violence is no consent, and, though a man lay no hands on a woman, yet, if by an array of physical force he so overpowers her mind that she does not resist, he is guilty of rape by having the unlawful intercourse."

Here, again, it is contended that the instruction introduces into the case the element of "physical force," which had no existence in fact. It is not necessary to enlarge upon what we have heretofore said. This statement of the law is found in 2 Bish. on Crim. Law, section 1122, and is applicable to the evidence in the case.

Counsel further complain of the refusal of the court to give instruction number 9½, requested by appellant. This is a somewhat lengthy instruction, but we think it is not a correct statement of the facts as shown by the evidence. It omits to state, or in any way refer to the fact of fear or apprehension of harm on the part of the prosecuting witness. The subjective condition of the injured party is totally ignored in the instruction.

In *Barker v. State*, 48 Ind. 163 (167), this court said: "Instructions should be predicated on the whole evidence, and when they have a tendency to restrict the consideration of the jury to isolated facts, to the exclusion of other facts which are before them in evidence, it is not only a misdirection, but an infringement on the province of the triors of the fact."

Further the instruction closes by saying, in substance, if she submitted to the act of intercourse by defendant

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he would not be guilty. All the facts stated in the instruction might be true, yet, if the woman did submit to the act of intercourse, not voluntarily, but against her will, the defendant would be guilty of rape. Besides, the ground occupied by this instruction was covered by instructions number 6 and 8 asked by the appellant and given by the court, and he could not be harmed by its refusal.

Counsel complain of the refusal of the court to give instruction number 7 asked by the defendant, upon the subject of want of consent.

But in instruction number 1, asked by the appellant and given by the court, this language occurs: "Rape is the carnal knowledge of a woman without her consent."

In a subdivision of instruction 3, this language occurs: "That said carnal knowledge of said Mollie Terrell was not only obtained by force and threats, but without the consent, and against the will of said Mollie Terrell."

In instruction number 4, asked by the appellant, is the following language: "You must be satisfied from the evidence, beyond a reasonable doubt, that he had carnal knowledge of said Mollie Terrell forcibly and against her will."

The fifth instruction, asked by appellant, told the jury in substance that if she consented to the act of intercourse, it would not be rape. The idea of want of consent being an essential element in the offense charged, is brought before the jury prominently, in most of the instructions given in the cause, so that they were fully advised upon the question, and knew it to be an ingredient of the crime.

There is nothing in the omission of the court to instruct the jury, upon the failure of the defendant to tes-

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tify in his own behalf, as the defendant did not request such instruction. *Grubb v. State*, 117 Ind. 277 (280).

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Nov. 27, 1894.

No. 16,955.

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TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY ET AL. v. LOOP.

RAILROAD.—*Standing Timber Close to Right of Way.—Possibility of Falling on Railroad Track.—Right of Railroad Company to Cut Down.—Damages.—Injunction.*—Where a railroad company, by its agents, without notice or permission, entered upon land adjoining its right of way and cut down growing timber, the only reason for such act being fear that the timber might fall upon the railroad track, owing to the close proximity of such timber to the railroad company's right of way, the railroad company is liable in damages for the trees cut down, and may be enjoined from cutting other of such timber; the danger not being shown to be immediate and probable, but remote and barely possible, which was not sufficient to justify the acts complained of.

From the Howard Circuit Court.

S. O. Bayless and *C. G. Guenther*, for appellants.

J. C. Blackledge, *C. C. Shirley* and *B. C. Moon*, for appellee.

HOWARD, J.—This was an action brought by the appellee to enjoin the appellants from entering upon the lands of appellee, adjoining the railroad right of way, and from cutting the growing timber thereon; also, to collect damages for timber already cut.

Judgment for damages and a perpetual injunction were awarded as prayed for.

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The only alleged error discussed in appellants' brief is the sustaining of the appellee's demurrer to the appellant railroad company's special paragraph of answer.

In this paragraph of answer the appellant company avers that it is the owner, controller, and in the daily use, of a right of way through the lands of appellee; that upon "said land, and near the right of way, are a few standing trees, varying in size; that the upper portions and tops of said trees extend over the defendant's right of way, and near to and along a line perpendicular with the defendant's railroad track; that because of the location of defendant's tracks and the close proximity of the standing trees upon the plaintiff's lands, at the time and immediately before the cutting down of the same, as mentioned in plaintiff's petition, there was great and immediate danger of said standing trees falling upon the defendant's right of way and said defendant's railroad tracks * * *; that for the reason aforesaid the said defendant, by its employes, peaceably entered upon the plaintiff's lands and cut down a few of said trees, standing as aforesaid and so interfering with the safe operation of defendant's said trains; that in cutting down said trees it did so in a proper and workmanlike manner and in no way whatever destroyed or injured the timber in said trees, more than would naturally result from a careful cutting down of the same."

Appellant thus admits that without notice or permission, it entered upon appellee's land and cut down his growing timber. And this action counsel seek to justify.

The only reason given for fearing that the timber might fall upon the track was "the close proximity of the standing trees upon the plaintiff's lands."

Counsel refer us to no section of the statute authorizing the entry or the cutting of the timber.

By section 5160, R. S. 1894 (section 3907, R. S.

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1881), a railroad company is permitted to enter upon land "for the purpose of examining and surveying its railroad line," with a view to appropriating a strip for its right of way. We have here no such case. The company was already in possession and use of its hundred foot strip of right of way.

Neither have counsel been able, as they confess, "to find a case anywhere in the books that passes directly upon this precise question." Indeed, we should marvel very much if any one were found, whether owner of the fee or of a right of way, who ever before seriously sought to justify his entry upon another's premises to cut down the timber, simply because it stood close to the line.

No doubt, if a boulder, a log or a decrepit tree threatened to roll or fall from adjoining land upon a railroad track or other highway, and there was no time to lose in seeking permission from the owner, any one might enter upon the land to avert the danger. *Mayhew v. Burns*, 103 Ind. 328; *Cooley Torts*, p. 46; *Wood Nuisances*, section 107.

There is, however, no pretense of such a state of affairs in this case.

All peril may not be averted; it is the immediate and probable, not the remote and barely possible, that we are called upon to guard against. The tree along the roadside may grow on from year to year, increasing in strength even into the centuries; yet a hurricane may rise within an hour and overturn the stalwart oak upon the passing traveler. It is not, however, such merely possible injury, but an imminent and probable danger, that one may seek to avoid by entering unbidden upon the land of another.

As for trees that grow so close to the line that their branches extend over the adjoining premises, there is no doubt that if injury is shown the adjoining owner may

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have his action in damages; or he may cut off the overhanging branches so far as they extend above his soil. He may not, though, cross his neighbor's line and cut down the trees. Wood Nuisances, section 108; *Lemmon v. Webb*, L. R. (1894), 3 Ch. Div. 1.

The judgment is affirmed.

Filed Dec. 13, 1894.

No. 15,777.

THE DORSEY MACHINE COMPANY ET AL. v. MCCAFFREY.

CORPORATION.—Conspiracy.—Fraudulent Increase of Stock.—Damages.

—A corporation may become a party to or participator in a conspiracy to increase its capital stock for a fraudulent purpose, and will be liable for damages resulting therefrom.

SAME.—Stockholders.—All Need not Participate in Fraud in Order to Bind Corporation.—It is not essential to bind the corporation for wrongs resulting from a fraudulent increase of its capital stock that all of its stockholders should participate in the act, but it is sufficient if enough engage therein to bring about the increase under the requirements of the law.

SAME.—Purchase of Stock.—Fraudulent Representations by President as to Value.—Damages.—Assignment.—Parties.—Where one is induced to purchase stock in a corporation by the false and fraudulent representations of its president as to the value of the stock and the solvency of the corporation, and the corporation receives and uses the proceeds of the sale, the latter is liable for the damages thereby sustained, without reference to the manner in which the stock was issued, and a complaint to recover such damages will lie, although the corporation is insolvent and is being wound up under a statutory assignment, and in such case the assignee is a proper but not a necessary party.

STATUTE OF LIMITATIONS.—Fraud.—Ignorance of.—In suits in equity, where a party has been injured by the fraud of another, and such fraud is concealed, or is of such a character as to conceal itself, whereby the injured party remains in ignorance of it without fault or want of diligence, the statute of limitations does not begin to run

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until the fraud is discovered, even though there be no affirmative acts of concealment.

SAME.—*When Question of Raised by Demurrer and When Not.*—Where a complaint shows upon its face that the action was commenced after the time limited, the question can be raised on demurrer, provided the statute is absolute, having no exceptions; if there be exceptions, however, and the complaint does not show that the action is not within any of them, a demurrer will not raise the question.

SAME.—*Corporation.—Sale of Stock.—Fraud.—Affirmative Concealment.*—Where the president of a corporation, acting as such to induce an infant, inexperienced in business affairs, to purchase the corporation stock, and to mislead such infant as to the facts, falsely and fraudulently represents that the corporation is solvent and prosperous, but that the purchaser must not expect any dividends for three years, as it was intended to increase the business of the corporation, and the purchaser relies upon such representations and makes no investigation, there is such concealment as postpones the running of the statute of limitations until the discovery of the fraud.

TRIAL.—*Postponement After Commencement from One Term to Next.—Sick Juror.*—Under section 1379, R. S. 1881 (Burns R. S. 1894, section 1442), the trial court has power, where a trial requiring many days is commenced on the next to the last day of a term, and a juror becomes ill and unable to then serve, to postpone the further hearing to a day in the next term, and to order the jury and witnesses to then attend and conclude the trial.

STRUCK JURY.—*Party Present but Refusing to Strike.—Withdrawal of Demand.—Clerk May Strike.—Motion to Quash Venire.*—Where a party demands a struck jury and attends at the time fixed for striking the same, and is furnished by the clerk with a list of the names selected which he considers, and then announces that he withdraws his demand for a struck jury and refuses to proceed further, the clerk is authorized to proceed as in the case of an absent party, and a motion by the party demanding such struck jury to quash the venire should be overruled.

From the Wayne Circuit Court.

C. H. Burchenal and J. L. Rupe, for appellants.

M. E. Forkner and T. J. Study, for appellee.

DAILEY, J.—The facts constituting the plaintiff's cause of action, as shown by the complaint, stated briefly, are substantially as follows:

The Dorsey Machine Company was organized on Oc-

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tober 14, 1879, with a capital stock of \$60,000, for the purpose of manufacturing and selling reapers and other agricultural implements, and, on October 17, 1881, the stock of the company was increased to \$125,000, up to which time the business of the company had not been prosperous, successful or remunerative; but, on the contrary, the company had sustained serious loss, and was, at that time, actually insolvent and unable to pay its debts, and was pressed to the last extremity for money to keep the company going, all of which the appellants, except Warren, who were then the directors and officers of the company, and large holders of the original stock thereof, then well knew. And knowing the insolvent condition of said company, and its pressing need of money to pay its debts and keep its business from stopping, and recognizing the utter worthlessness of the stock, the defendants Morris, Liebhardt, the Fergusons, and Kinsey and others, who were directors of the company, together with others who were its stockholders, conspired and confederated together for the purpose of fraudulently increasing the stock of the company, and selling such increase outside of the company for the purpose of paying its debts and keeping it going in apparent prosperity until they could sell and dispose of their own stock, and thereby cheat and defraud those who might purchase such new and original stock, by making certain false representations as to the property, condition and business of the company, the value of its stock and the nature and extent of its liabilities.

About January 1, 1882, the plaintiff was unmarried, under the age of twenty-one years, inexperienced and ignorant of business, and under guardianship of one Millikin, who had in his hands, as such, a large amount of money which would come to plaintiff at her majority, on November 7, 1882. Said facts were known to de-

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fendant Morris, who, for himself and his coconspirators, sought out the plaintiff and importuned her to purchase one hundred shares of said increased stock for the sum of \$5,000; and to induce her to do so, he, for himself and codefendants and coconspirators, and in pursuance of said conspiracy, falsely and fraudulently represented to her that said company was solvent, and doing a prosperous business; that it was not increasing its stock to pay debts or because it needed money, but to enlarge its business; that the stock represented \$1.37 to every dollar of the face value of said stock of solvent assets, and its stock was worth \$1.37 to the dollar; that the company had no debts, and had a large surplus, to wit, \$47,000 of solvent assets; that all of said representations were false, and known to be by said Morris and the other defendants. Each one of the facts so represented is specifically negatived, and it is alleged that the company was insolvent, and the stock worthless; that at the time of making said representations, said Morris was well known to her, and reputed to be a person of large property, and great business capacity and integrity, wherefore she confided in him, and believed in, and relied on his representations as being true, and purchased \$5,000 of the stock, for which she gave her note, and afterwards paid the same; that no dividends have ever been paid on the stock, and it is worthless; that the company on December 20, 1888, being insolvent executed an assignment of all its property to the defendant Warren, for the benefit of its creditors, and the assets in his hands are not sufficient to pay the debts of the company, or any part of its liability to its stockholders. The complaint then goes on to allege certain things done and omitted by the defendants which are said to have prevented the plaintiff from discovering her cause of action, and by which it was concealed from

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her until within the last year, and concludes by claiming damages in the sum of \$8,000. The defendants severally demurred to the complaint on the ground that it did not state facts sufficient; which demurrers were severally overruled, and defendants severally excepted. The defendants answered in two paragraphs:

1st. General denial.

2d. The statute of limitations.

The plaintiff filed a reply to the second paragraph of the answer, the first being a general denial; and the second setting up certain matters by which it was alleged that the plaintiff's cause of action was concealed from her until within the period of six years before the commencement of the action. The defendants demurred to the second paragraph of the reply; which was overruled and they excepted. The cause was tried by a struck jury, who returned a verdict for the plaintiff in the sum of \$7,568.90, and also returned answers to certain interrogatories propounded to them. Separate motions for a new trial were filed by the defendants, all of which were overruled; and on the 29th day of March the court rendered judgment against the defendants, except Warren, from which the defendants severally appeal. All the defendants unite in an assignment of errors, four in number. Several of the defendants also make separate specifications of error, but as these cover substantially the same grounds, for convenience we will consider them together. Among the alleged errors discussed by the learned counsel for the appellant, is the ruling upon the demurrer to the complaint. They say the demurrer of the Dorsey Machine Company to the complaint should have been sustained. The fraud, if any, was committed by individuals engaged in it, and not by the corporation. The corporation is made up of all the stockholders, all of whom are interested in proportion to the

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amount of their stock. It is not alleged that all of the stockholders engaged in the conspiracy, or participated in the alleged fraud, but only that the makers and some others did so. The complaint shows that at the time the conspiracy set forth therein was entered into, the defendants Morris, Liebhardt, Oliver and Linville Ferguson, Kinsey, Gresh and Gaines were the directors of said company, and that the defendants in the action, which includes said company, combined, confederated and conspired together, and, with others, whose names are not known to the plaintiff, but who then held and owned large amounts of the original stock of said company, for the purpose, and with the intent to fraudulently increase the capital stock of said company to \$125,000, for the fraudulent purpose of cheating and defrauding those who might purchase stock. And that for said purpose the stock of said company was, on or about the 17th day of October, 1881, increased \$65,000, making its capital stock \$125,000. The complaint also shows that said Morris, in January, 1882, was the president of the company, and while then acting as such, by means of the false and fraudulent representations he then made to the appellee, induced her to purchase of said company one hundred shares of its capital stock, for which the appellee executed to the company her note for \$5,000, which she paid to it on the 11th day of November, 1882. In our opinion the complaint shows a good cause of action against the company. It is the law that a corporation may become a party to, or participator in a conspiracy, such as is charged in the complaint, and may be liable for the damages resulting therefrom.

In *Buffalo, etc., Oil Co. v. Standard Oil Co.*, 106 N. Y. (Appeals) 669, the court say: "We entertain no doubt that an action against a corporation may be maintained to recover damages caused by conspiracy . * * *."

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If actions may be maintained against corporations for malicious prosecution, libel, assault and battery and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled by the authorities cited, that the malice and wicked intent needful to sustain such actions may be imputed to corporations."

In *Cragie v. Hadley*, 99 N. Y. App. 131 (134), it was said that "a corporation may be in a legal sense guilty of a fraud. As a merely legal entity it can have no will, and can not act at all, but in its relations to the public it is represented by its officers and agents, and their fraud in the course of the corporate dealings, is in law the fraud of the corporation."

The proposition is sustained by the authorities that a corporation may be charged with any wrong that may be committed through an agent, and may be held liable for damages caused by his deceit or false representations. In such case the doctrine of *ultra vires* has no application *Morawetz Priv. Corp.*, paragraphs 725, 726, 727; *National Bank v. Graham*, 100 U. S. 699, 702; *Fiskhill Savings Inst. v. Nat'l Bank, etc.*, 80 N. Y. 162; *American Exp. Co. v. Patterson*, 73 Ind. 430; 2 Wait's Act. and Def., 337.

Increasing the stock of a corporation is its act, and like every other act by a corporation, can only be done through the instrumentality of some person acting for or in its behalf; and when the stockholders of the appellate company increased its capital stock, they did so as the agents of and for the company, and the act was that of the company. It is true the complaint does not show that all the stockholders of the company participated in increasing its stock, or in the fraud and conspiracy charged therein, but it does show that a sufficient number of them so engaged to effect the increase under the

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requirements of the law, and when this was done it became the act of the corporation, and rendered it liable for the consequences of such wrongful act. The damage which the appellee sustained by reason of the alleged false and fraudulent representations made by said Morris, as a stockholder and president of the company, to her, and by which she was induced to invest in shares of the stock, is the foundation, or gist, of the action.

The conspiracy is charged in the complaint for the purpose of holding certain of the appellants liable for the damage the appellee has sustained by reason of the false and fraudulent representations claimed to have been made to her, by which she was induced to purchase said shares of stock, and in the making of which they did not actually participate. But to hold such company liable for the direct and proximate consequences of said representations made by its president and chief officer and agent, for and on behalf of the company while transacting its business, it is not necessary to either charge or prove a conspiracy, because the foundation of the action is the damage done the plaintiff by the violation of her rights, and not the conspiracy. The fact of conspiracy is only matter of aggravation. *Hutchins v. Hutchins*, 7 Hill (N. Y.), 104; *Kimball v. Harman*, 34 Md. 407; *Cooley Torts*, 124, 126.

This is clearly sound doctrine in a case like this, where the company received the money, the fruits of the alleged fraud, and appropriated the same to its use. It is also contended that the complaint is not good as to said company for the reason that the complaint shows the company is insolvent, and is being wound up under a statutory assignment, and this would preclude a recovery, even if, under the facts stated, the company would have been liable had not insolvency intervened. We are unable to find any authorities in support of this propo-

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sition, and think they do not exist. They go no further than to lay down the familiar rule that where a shareholder has been induced to subscribe for stock through the fraud of the company, he can not annul the contract of subscription and recover back what he has paid into it, and thereby free himself from liability, if others, in the meantime, have acted upon the faith of such subscription; under such circumstances as between them and the stockholders, responsibility for the fraud attaches to him.

The complaint alleges the insolvency of the company but it does not state when its unpaid liabilities were contracted, nor can it be inferred from anything contained therein that said liabilities, or any part thereof, were contracted upon the faith of the appellee's subscription. It is needless to say the present suit was not brought by the appellee to annul her contract of subscription, but to recover damages she has sustained by reason of the alleged fraud. The relief sought and obtained in this case is entirely different from that given the shareholder in an action by him, if successful to annul his contract of subscription. In the latter action the shareholder recovers back all he has paid into the company, while in the present case the appellee could only recover the amount of damage she has sustained by reason of the fraud so perpetrated, which might be much less than the amount she paid for the stock, or it might be more.

It is lastly urged against the sufficiency of the complaint as to the corporation that it shows the appellee's cause of action is barred by the statute of limitations. In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not

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bar relief, provided suit is brought within the proper time after the discovery of the fraud. Also, in suits of equity the decided weight of authority is in favor of the proposition that where a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the person committing the fraud to conceal it from the knowledge of the other party. *Wear v. Skinner*, 46 Md. 257 (265); *Booth v. Warrington*, 1 Bro. P. C. 445; *Fisher v. Tuller*, 122 Ind. 31; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovendon v. Annesley*, 2 Schoales and Lef. 634; *Stearns v. Page*, 48 U. S. (7 How.), 818; *Moore v. Greene*, 60 U. S. (19 How.) 69; *Sherwood v. Sutton*, 5 Mason, 143; *Snodgrass v. Branch Bank, etc.*, 25 Ala. 161.

It is claimed there could be no exception to the running of the statute as to the corporation. The rule is, that where the limitation in a certain case is absolute, and there are no exceptions to the running of the statute, and the complaint shows, upon its face, that the action was commenced after the time limited, the question can be raised on demurrer. But where there are exceptions to the period limited by statute, in any case, and the complaint shows, upon its face, that the action was not brought within the time limited, still the question can not be raised by demurrer to the complaint, unless it also shows that the particular action is not within any of the exceptions to the statute.

The complaint in the case under consideration does not show this. The law in this State is adverse to the contention of the appellant corporation. *Hanna, Admr.*, v. *Jeffersonville R. R. Co.*, 32 Ind. 113; *Potter v. Smith*,

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36 Ind. 231; *Harlen v. Watson*, 63 Ind. 143; *Baugh v. Boles*, 66 Ind. 376; *Kent v. Parks*, 67 Ind. 53; *Cravens v. Duncan*, 55 Ind. 347.

At the time the plaintiff's cause of action accrued, she was an infant, and might also have labored under some other supervening disability that arrested the progress of the statute and exempted her from its effect, or she might have rested under divers other legal incapacities, for aught that appears in the complaint. The averments do not show that none of the exceptions existed which prevent the bar of the statute, and the question whether the cause of action is barred can not be raised by demurrer to the complaint.

It is also claimed by the appellant Dayton H. Warren, assignee of the company, that his demurrer to the complaint should have been sustained, because it is not alleged that he was a party to the fraud. But it is alleged that he is its assignee, and, as such, he must hold the assets that might be affected by any judgment rendered against the company for the payment of its debts and liabilities. In our judgment, the assignee was not a necessary party to the action, but we think he is a proper one.

It is further argued by counsel for the assignee, in support of his demurrer to the complaint, that even if the appellee had a cause of action against the company for fraud, the appellee had no right as against the creditors of the corporation to be compensated out of the assets. This position is based upon the assumption that the unpaid debts and liabilities of the company were contracted after and upon the faith of the appellee's subscription.

This takes too much for granted. There is nothing in the complaint showing the amount of the indebtedness, or when it was contracted, whether before or after

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the increase of the stock, or whether before or after the appellee subscribed for or bought her stock. The inference is just as strong that this indebtedness was contracted prior to the increase of the stock and the purchase by the appellee, as it is that it was contracted after these events. We think this question of little importance.

If the plaintiff had a cause of action, she had a right to have her claim for damages fixed and determined against the company and all others liable, which could only be done by instituting an action for that purpose, and no question arises now as to her right to share with the creditors of the company in the distribution of its assets. This question can only be presented when the proper proceedings are instituted therefor.

The learned counsel of appellants concede that, "as to the other defendants, the complaint probably states facts sufficient to show a cause of action existing on the 7th day of November, 1882," but insist that the statute of limitations shields them and defeats the remedy. What has been heretofore said in considering the demurrers of the company and the assignee, Warren, applies with equal force to these defendants.

In the second paragraph of the reply to the second paragraph of the answer, the specific acts and facts constituting the concealment are specifically stated, from which it appears that at the time appellee purchased said stock as alleged in the complaint, the said defendant Morris, for himself and for and on behalf of his codefendants and coconspirators, except the defendant Warren, for the fraudulent, false and wrongful purpose of concealing from and preventing plaintiff from discovering her said cause of action and the falsity of said representations so made to her by said Morris, and the insolvent condition of said company, and the condition of

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its business affairs, stated to the plaintiff that she need not expect any dividends on her stock for three years; that they intended to increase the business of said company, and the latter would not pay any dividends for that period. All of which statements the plaintiff says she believed to be true, and relied upon them as being true, for which reason she says she did not make any application to said company for any dividends, or make any investigation as to the financial condition of said company during said period.

We think this statement was well calculated to lull appellee into repose, and cause her to make no demand upon or application to the company for dividends during that time. Morris knew she was a minor, inexperienced in business and could not actively aid in the management of its affairs. Its direct tendency was to effectually obstruct and conceal the only source and channel through which she could receive knowledge of the company's real condition. This is especially so when it is remembered that Morris represented the company as possessed of a large surplus capital and highly prosperous. The concealment need not be subsequent to the accruing of the cause of action concealed, but may be coincident with it.

In *Boyd v. Boyd*, 27 Ind. 429, after deciding the point that the concealment contemplated by the statute must be something more than mere silence, and that it must be an arrangement or contrivance to prevent subsequent discovery, and must be of an affirmative character, the court say: "But it does not occur to us that it needs to be concocted after the accruing of the cause of action, provided it operates afterwards as a means of concealment, and was so intended. In other language, the defendant must not, at any time, do anything to prevent the plaintiff from ascertaining, subsequently to the trans-

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action out of which the right of action arises, the facts upon which that right depends, either by affirmatively hiding the truth, enhancing the natural difficulty of discovering it, or by any device avoiding inquiry which would result in discovery." *Bartalott v. International Bank*, 14 Ill. App. 158; *Way v. Cutting*, 20 N. H. 187; *Quinby v. Blackey*, 63 N. H. 77; *Bailey v. Glover*, 21 Wall. (U. S.) 342; 2 Greenl. on Ev., par. 448.

In our opinion a party is not bound to presume fraud unless he has notice of facts which would put a reasonable man on inquiry. When, therefore, he has notice of no such facts, he can not be charged with a want of diligence in not discovering the fraud.

In 1 Yapple's Code Prac. & Prec., 431, the author says: "Where it is provided that the statute of limitations does not begin to run until after discovery, it would seem to be a sufficient averment to bring the case within the saving, to state in the pleading that the party did not discover it until a certain time within the limited period."

The replies of concealment to the statute of limitations in the cases of *Arnold v. Scott*, 2 Mo. 13; *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201, and *Homer v. Fish*, 1 Pick. 435, did not contain any of the averments insisted upon by counsel for the appellant, and yet were held sufficient upon demurrer.

The record shows that the trial of the cause commenced on the 15th day of January, 1890, being the last day but one of the November term of the Wayne Circuit Court, when one of the jurors trying the cause being then sick and unable to attend court and go on with the trial, and would not be for several days, and the parties being unwilling to proceed without him, and it appearing that if the juror was present and able to sit, the trial could not be concluded at that term, the court ordered the further hearing of the cause to be adjourned and con-

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tinued until February 10, 1890, the seventh juridical day of the next term thereof and directed the jury to be present at the time fixed, to proceed with the trial. On that day the jury appeared and the trial was resumed. On the 8th day of March they returned their verdict.

It is claimed by the counsel for the defendants that the court had no power or authority to continue the trial of said cause from the 31st of January, 1890, to the 10th day of February, as was done, and to order the attendance of the jury and witnesses at that time, to then conclude the trial thereof.

We think it clear that this action of the court was not prematurely taken and was within the spirit of section 1379, R. S. 1881, Burns R. S. 1894, section 1442. This statute is a remedial one, intended to prevent mistrials, and should be liberally construed to that end. In relation to the striking of the jury that tried the cause, and the motion of the defendants to quash the *venire*, the record shows this state of facts: On the 23d of December, 1889, the defendants filed with the clerk their demand for a struck jury to try the cause. The clerk fixed the time of striking the same at 10 o'clock A. M. of December 28, 1889, and so notified the parties. At the time fixed the parties appeared at the clerk's office for that purpose, and thereupon the clerk handed to the attorneys of the defendants a list of forty names on a slip of paper, from which a jury was to be selected; and a like list, on a slip, to the attorneys of the plaintiff. The list handed to the attorneys of the defendants, they and two of the defendants in person took and carefully considered and canvassed the names thereon for about an hour and then informed the clerk and the attorneys of the plaintiff that they would not demand a struck jury and would withdraw their demand therefor. Thereupon the plaintiff's attorneys demanded that the clerk proceed

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with the striking of the jury as the law requires in such cases, which he and the attorneys of the plaintiff proceeded to do, the clerk first striking out one of the names on the list, and the plaintiff's attorneys then striking out another; and they proceeded and continued to thus alternately strike out one of said names each, until said clerk had stricken out twelve of said names, and the attorneys of the plaintiff a like number thereof. Afterwards, the defendants objected to the summoning of the jury so struck, and asked the clerk not to issue a *venire* for them, and that the regular panel be recalled to try the cause.

In support of their objection they filed certain affidavits, and the plaintiff filed an affidavit in opposition thereto. The court overruled the objection, and directed the clerk to issue a *venire* for said jury. After said jury had been summoned, and before they were impaneled and sworn, the defendants filed their motion to quash the *venire* and their challenge to the array of said panel, supported by certain affidavits, and the plaintiff presented an affidavit in opposition thereto. The court overruled the motion and challenge. It is shown by the record that several days prior to the time the defendants demanded a struck jury, and during the November term of said court, the defendants' attorneys stated in open court that they would not try said cause by the regular jury, then in attendance, but would demand a struck jury to try the cause, and that on the 20th of December, 1889, the judge of said court notified one of the defendants' attorneys that there was no cause to be tried by a jury at that term, unless they desired to so try this case, and was informed by said attorney that they did not desire to try it by the regular panel, but would demand a struck jury, and thereupon said regular jury was on said day discharged for the term. We think

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there was no error in these proceedings of which the appellants can complain. The statute must receive a reasonable construction, and when either party is present at the time and place fixed to strike the jury, and refuses to act, he is absent within the meaning of the statute, and the clerk should strike out names for him. It is true the machinery of the law is put in motion by the party making the demand for a struck jury, but when it is once set in motion, and the clerk is caused to act officially in the matter, it does not lie with the party invoking its aid to arrest the force so created. And when in this case the parties appeared in the clerk's office at the time fixed for striking the jury, and the clerk selected the names of forty persons from which the jury was to be struck, and gave to each of the parties a list of such names, the process of striking the jury had actually commenced; the clerk was in the performance of an official duty as a public officer, and it was not then within the power of the defendants to stop or impede the proceeding by withdrawing their demand for a struck jury, or by remaining present, protesting and refusing to act. Some objections are made by the learned counsel for the appellants to a portion of the instructions given to the jury. The objections offered are quite numerous, but we think that when the instructions are considered together, as they should be, they fully and correctly state the law applicable to the case. The appellants also tendered certain instructions which were refused by the court, but every point in the case seems to be fully covered by the numerous and carefully framed instructions, which the court gave the jury, and it was not necessary or proper to indulge in repetitions.

The judgment of the lower court ought to be, and it is affirmed.

Filed Sept. 25, 1894; petition for a rehearing overruled Dec. 19, 1894.

No. 16,962.

CROW v. JUDY ET AL.

139	562
5162	698
139	562
5167	70

GRAVEL ROAD.—Sufficiency of Petition.—Part of Road Over Route where no Highway Previously Existed.—No Power in Such Proceeding to Locate and Establish Highway.—Where a petition for the establishment of a free gravel road shows on its face that one mile of the proposed improvement is to be over a route where no highway exists, but that it will connect with and join two existing highways, both of which are included in the petition, but it is not shown in the report, nor does it appear in the order of the board of commissioners establishing the improvement, neither is it found by the decree of the circuit court, that this mile of road is laid upon new ground for the purpose of straightening any public highway, nor that better drainage will be secured thereby, nor that any route of travel for the public will be shortened, nor that there will be any road changed, improved or affected by this particular mile of improvement,—the petition did not state facts sufficient, and the court acquired no jurisdiction over the subject-matter of the proceeding. The board of county commissioners has no power, under the statute, to construct a gravel road over a route where no highway previously existed, except for shortening, straightening, etc., as above stated.

From the Warren Circuit Court.

W. L. Rabourne, for appellant.

J. F. Hanly, *E. C. Stansbury* and *J. C. Stephens*, for appellees.

DAILEY, J.—On the 11th day of June, 1892, a petition and bond were filed before the board of commissioners of Warren county, praying for the establishment and construction of a free gravel road, under an act of the General Assembly of the State of Indiana, approved March 3, 1877, being sections 5091 to 5096, inclusive, of the R. S. 1881. The petition shows on its face that one mile of the proposed improvement is to be over a route where no highway exists, but that it will connect with and join two existing highways, both of which are included in the petition.

Crow v. Judy *et al.*

Such proceedings were had before the board as resulted in an order for the improvement prayed for. From this order the appellant appealed to the Warren Circuit Court, where, on motion of the petitioners, the court rendered judgment for the appellees, and from it this appeal is taken.

Without reciting the various motions made by the appellant before the board and renewed by him in the circuit court, it is enough to say that appellant's "motion to reject the report of the commissioners," his "motion to strike out portions of the petition and report of the viewers," and his assertion that "the petition does not state facts sufficient to entitle appellees to the relief sought," are each and all based on a single proposition, viz.: *That the board of commissioners have no power under the statute to construct a gravel road over a route where no highway previously existed.* The report of the commissioners who surveyed the route, and the decrees of the commissioners and circuit court, are silent upon the question as to whether or not any part of the improvement will be over a route where there is no highway, but each follows the way described in the petition. It will be observed that this petition is in part for the improvement of a highway, but in so far as it seeks to enter and pass through private territory to reach a highway beyond, or to connect two highways by extending the proposed improvement across one mile of intervening space over which the public had acquired no right, it is simply a petition for opening and locating a public highway, and presents a jurisdictional question, viz.: Had the commissioners' court power in this proceeding to so appropriate the appellant's land?

Section 5015, R. S. 1881, defines the method by which public highways may be opened and established. Sections 5091 and 5092, R. S. 1881, provide for the im-

Crow v. Judy et al.

provement of public highways, but we think it was not intended that these sections shall be so construed as to supersede section 5015, *supra*. It is to be presumed that a highway must exist before it can be improved, and besides, sections 5091 and 5092, *supra*, make no provision for opening new roads, and are insufficient for that purpose. Section 5091, *supra*, declares the power of the boards to lay out, construct or improve, by straightening, grading, draining (in any direction that may be required to reach the most convenient outlet, etc.), paving, graveling or macadamizing any State or county road within the limits of their respective counties.

There is no doubt that if the proposed improvement had been laid upon new ground for the purpose of straightening or shortening the old highway, or for the purpose of straightening and obtaining a better route, it would present a question not now before us, and the case of *Gipson v. Heath*, 98 Ind. 100, would be directly in point to sustain the appellees, contention.

It is not claimed in the petition, nor is it shown in the report, nor does it appear in the order of the board of commissioners establishing the improvement, neither is it found by the decree of the circuit court, that this mile of road is laid upon new ground for the purpose of straightening any public highway, nor that better ground may be obtained for said highway, nor that better drainage is secured thereby, nor that any route of travel for the public will be shortened; nor does it appear any place in the record, that there is any road changed, improved, or affected by this particular mile of improvement. It does appear from the petition and the record, that there is a jog of twenty feet to the west when entering upon this new ground, and back again when across it. There is nothing, however, to show that this departure of twenty feet was necessary for the straightening or

 Griffin v. Ulen et al.

shortening of the road, nor that better ground could be obtained or drainage secured by the deflection so made in the line thereof.

It seems very clear to us that the board of commissioners have no right to invade private enclosures to open and establish a highway except upon petition under the statute authorizing it, and that it is beyond the power of the board to lay out a new road under a statute providing for the improvement of an old one. If a gravel road can be extended one mile over private land under these circumstances, there is no reason why it may not be extended ten miles for the purpose, and there would be no limitation upon the power of the board in such matter to impose burdens on one's land.

In our opinion the petition does not state facts sufficient to warrant the action of the court, and the court acquired no jurisdiction over the subject-matter of the proceeding, and the defect is not cured by the report of the surveyor nor by the finding of the court.

The judgment is therefore reversed, with instructions to the court below to sustain the appellant's motions to strike out part of the petition and report, and to reject the report of the viewers and dismiss the proceedings.

Filed Oct. 18, 1894; petition for a rehearing overruled Dec. 13, 1894.

 No. 16,605.

GRIFFIN v. ULEN ET AL.

139	565
142	101

WILL.—*Construction of.*—*Devisees.*—*Partition.*—*Residue to "Legal Heirs."*—Where a husband devises all his real and personal property to his wife for life or as long as she remains his widow, and provides that at her death or marriage his only son shall have his choice of forty acres in a division of the land to be made east and west, "and the residue to be divided equally amongst all" his

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"legal heirs," which consisted, besides the son, of eight grandchildren,—the son is entitled to forty acres to be selected by him, and no more; and the remaining real estate goes in equal shares to the grandchildren or their grantees, in which the son is not entitled to share.

SAME.—"*Heirs*," *How Construed*.—In a will, the force of the word "heirs" may be controlled by the context.

From the Boone Circuit Court.

P. H. Dutch, for appellant.

S. M. Ralston and *M. Keefe*, for appellees.

HOWARD, J.—Anthony Griffin, father of appellant, died in August, 1868, the owner of the land in controversy, having made his will which was duly probated, and which contained the following clause:

"I bequeath to my beloved wife, Nancy Griffin, all of my personal and real estate, both household and kitchen furniture, as long as she remains my widow, and at her death or marriage I want my beloved son, John Griffin, to have forty acres of my land, and I want the land to be divided east and west, and then I want my beloved son, John Griffin, to have the choice of the land. And I want, at the death or marriage of my beloved wife, Nancy Griffin, my three grandsons, John M. Hawkins, and Thomas B. Hawkins, and Elmer E. Hawkins, to have one bed and bedding each, and the residue of my land I want it to be divided equally amongst all my legal heirs, and I want my beloved grandson, John S. Anderson, to have no more than an equal share with the rest of the grandchildren."

Anthony Griffin left surviving him as his only heirs at law his widow, Nancy Griffin, his son, the appellant, and eight grandchildren.

On the death of Nancy Griffin, February 5, 1891, John Griffin selected the south half of the land left by his father, being forty acres, as his land under provisions

of the will; but he claimed, in the partition, to be also entitled to a share in the north half of the land as one of the "legal heirs" of Anthony Griffin.

The court found that John Griffin was the owner of the forty acres selected by him, and no more; and the remaining forty acres were partitioned equally amongst the grandchildren and their grantees.

We think this was a correct construction of the will. The will first gave to John Griffin one-half of the land, allowing him also his choice as to which half he would have. The giving of this definite portion would seem to exclude the giving of more. All further consideration of John Griffin was evidently out of the mind of the testator. John's interest had been finally and liberally disposed of.

In giving the rest of his land to be equally divided amongst all his "legal heirs," and particularly in specifying that John S. Anderson should have no more than one of the rest of his grandchildren, it seems clear that the testator meant to designate all his grandchildren as the heirs to whom the remaining half of his land should go "equally." In a will, the force of the word heirs may be controlled by the context. *Jones v. Miller*, 13 Ind. 337; *Ridgeway v. Lanphear*, 99 Ind. 251.

It is evident, we think, that, after providing for his son John, the testator's mind was upon a class to whom the residue of his land should go equally; and the mention of his grandchildren fixes them as that class.

The term "legal heirs" will be construed to mean children, when it clearly appears that such was the intent of the testator. *Underwood v. Robbins*, 117 Ind. 308. And the principle is not different for grandchildren when definitely referred to as here.

The judgment is affirmed.

Filed Dec. 11, 1894.

The City of Alexandria v. Cutler et al.

No. 17,085.

THE CITY OF ALEXANDRIA v. CUTLER ET AL.

139 568
 149 265
 153 701
 139 568
 153 483
 139 568
 154 196

REPORTER'S LONGHAND MANUSCRIPT OF EVIDENCE.—*How Made Part of Record.*—*Bill of Exceptions.*—There is no mode of bringing the evidence taken by an official reporter to this court except by embodying it in a proper bill of exceptions.

BILL OF EXCEPTIONS.—*Where Evidence not Properly in Record.*—Where what purports to be a bill of exceptions follows the longhand manuscript in the record, the bill being destitute of a proper caption, and nowhere refers to the longhand manuscript, and, considered alone, does not show that an official reporter had been appointed, nor that there was a manuscript of the evidence in the cause, the evidence is not properly in the record.

From the Madison Circuit Court.

F. P. Foster, for appellant.

H. C. Ryan, for appellees.

COFFEY, C. J.—This was an action by the appellant against the appellees, in the Madison Circuit Court, to enjoin the latter from obstructing an alleged street.

A trial of the cause by the court resulted in a finding and judgment in favor of the appellees.

The assignment of error calls in question the propriety of the ruling of the court in overruling the appellant's motion for a new trial.

The only reasons assigned for a new trial were:

"*First.* That the decision of the court is not sustained by sufficient evidence."

"*Second.* That the decision of the court is contrary to law."

It is contended by the appellees that we can not consider the question attempted to be presented, for the reason that the evidence heard on the trial of the cause is not properly in the record.

This contention must be sustained.

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There appears with the transcript what purports to be the longhand manuscript of the evidence given at the trial, as taken by an official reporter, but this manuscript is not embodied in a bill of exceptions. There is no statement of the judge before whom the trial was had that this manuscript contains all the evidence given on the trial of the cause. There is no mode by which the evidence taken by an official reporter at the trial of a cause can be brought to this court unless it is embodied in a proper bill of exceptions. *Wagoner v. Wilson*, 108 Ind. 210; *Ohio, etc., R. W. Co. v. Voight, Admr.*, 122 Ind. 288; *Patterson v. Churchman*, 122 Ind. 379.

It is true there seems to have been an effort to embody the evidence in a bill of exception, but what purports to be the bill follows the longhand manuscript in the record, and is destitute of a proper caption. It nowhere refers to the longhand manuscript, and, taken alone, the reader would not be able to determine that an official reporter had been appointed or that there was such a thing in existence as a manuscript of the evidence taken in the cause. A bill of exceptions in cases like this, as in other cases, should have a proper caption and ending.

For the reason that the evidence is not properly in the record, no question is presented for our consideration.

Judgment affirmed.

Filed Dec. 18, 1894.

 Prather *et al.* v. Prather *et al.*

No. 16,997.

PRATHER ET AL. v. PRATHER ET AL.

BILL OF EXCEPTIONS.—*Failure to File With Clerk.*—*Not Properly in Record.*—If it does not appear that a bill of exceptions was filed with the clerk of the trial court, it is not properly in the record, and no question upon the evidence can be entertained.

From the Clark Circuit Court.

L. A. Douglass and *W. H. Talbott*, for appellants.

M. Z. Stannard, *H. A. Burt* and *J. E. Taggart*, for appellees.

HACKNEY, C. J.—The appellee, Sarah Ann Prather, sued her coappellees and the appellants for partition and to charge the real estate with the value of certain improvements made thereon by her. The decree directed the sale of the lands as not susceptible of division, and gave the plaintiff a lien for \$1,215 on account of improvements.

Several questions arising upon the evidence have been discussed by counsel, but objection is made to a consideration of such questions because of the insufficiency of the record to present the evidence.

The decree was rendered March 25, 1893, and sixty days were given in which to file bills of exceptions. The transcript contains what purports to be a bill of exceptions presented to and signed by the judge within the time allowed, but it does not appear that such bill was ever filed with the clerk.

Section 640, R. S. 1894 (section 629, R. S. 1881), makes it necessary not only that bills of exceptions shall be presented to and signed by the trial judge, but that they be filed in the cause. *Elliott's App. Proceed.*, section 805, p. 759; *Shulse v. McWilliams*, 104 Ind. 512; *Terre*

139	570
143	572
139	570
144	395
145	917
139	570
168	431

Benbow v. Garrard et al.

Haute, etc., R. R. Co. v. Bissell, 108 Ind. 112; *Guirl v. Gillett*, 124 Ind. 501; *Board, etc., v. Huffman, Admr.*, 134 Ind. 1; *Mason v. Brody*, 135 Ind. 582.

The bill not being properly in the record we must decline to entertain any question upon the evidence.

The only remaining question presented and discussed by the appellants is as to the sufficiency of the complaint. The objection urged to the complaint is that it does not allege that the improvements for which claim was made by the plaintiff were paid for by the plaintiff. The allegation is "that she has made valuable and lasting improvements on said real estate, an itemized statement of which is as follows," stating in detail the extent and value of such improvements. In our opinion this allegation sufficiently meets the objection urged. However, the complaint is unobjectionable as stating a cause for partition independently of any claim for improvements, and is good against a demurrer.

The judgment of the circuit court is affirmed.

Filed Dec. 14, 1894.

No. 17,113.

BENBOW v. GARRARD ET AL.

APPEAL.—Dismissal of.—Defect of Parties Appellant.—All parties entitled to appeal, *i. e.*, all parties against whom judgment is rendered, must be brought before the appellate tribunal as appellants in the same appeal, and notice served on them, or the appeal will be dismissed.

From the Delaware Circuit Court.

C. B. Templer, J. N. Templer and E. R. Templer, for appellant.

J. W. Ryan and W. A. Thompson, for appellees.

139	571
141	139
142	110
142	147
139	571
144	367
139	571
154	304
139	571
157	493
139	571
1171	461

Benbow v. Garrard et al.

MCCABE, J.—The appellant brought suit in the circuit court for partition of certain described real estate in Delaware county, against the appellees, William L. Garrard, Riley Garrard, George M. Garrard, Frank Prigg, Edna M. Prigg, and Herbert L. Benbow. The three Garrards filed a cross-complaint against the plaintiff, John C. F. Benbow, and their codefendants, Frank Prigg, Edna M. Prigg, and Herbert L. Benbow, claiming to own all the real estate sought to be parted in the original complaint, and seeking to quiet their title thereto. Issues were formed on the cross-complaint, a trial of which resulted in a finding and judgment in favor of said Garrards on their cross-complaint quieting the title of all of said real estate in them, and a judgment against all the defendants to the cross-complaint for costs in favor of the cross-complainants.

The original plaintiff, John C. F. Benbow, is the only one of the coparties and joint judgment defendants who appeals. He has not made any of the other joint judgment defendants parties to this appeal as either appellants or appellees. The statute requires them to be made parties. 1 Burns R. S. 1894, section 647 (R. S. 1881, section 635.)

And we have recently held that they must be made co-appellants and notice served on them, or the appeal must be dismissed for want of jurisdiction. *Gregory v. Smith*, 139 Ind. 48.

We there held that coparties mean coparties to the judgment, that is, all the parties against whom the judgment is rendered. See *Hadley v. Hill*, 73 Ind. 442.

To the same effect are *Wood v. Clites*, 39 N. E. Rep. 160, and *Gourley v. Embree*, 137 Ind. 82; *State v. Hodgin*, 139 Ind. 498.

All the parties entitled to appeal must be brought before this court as appellants in one and the same appeal,

Giffen *et al.* v. Taylor.

and notice served on them, or the appeal will be dismissed. *Gourley v. Embree, supra.*

The statute only authorizes one appeal from a judgment. Therefore, if the terms of the statute are not complied with in bringing before this court all the co-parties entitled to appeal by making them coappellants, thus affording them an opportunity to assail the judgment against them, this court has no jurisdiction to hear and determine the appeal in the absence of the other co-parties to the judgment. *Gregory v. Smith, supra; Wood v. Clites, supra; Gourley v. Embree, supra; Elliott's App. Proced., section 144.*

The appeal is, therefore, dismissed.

Filed Dec. 20, 1894.

No. 16,708.

GIFFEN ET AL. v. TAYLOR.

139	573
153	408

TRUST.—*Conveyance of Real Estate.*—*Aged Grandmother to Grandson.*—*Without Consideration.*—*Parol Agreement.*—*Statute of Frauds not a Cloak for Fraud.*—Where a woman seventy-eight years old, who could neither write nor read writing, and her husband being eighty-two years old, conveyed her real estate, her husband joining, to her grandson, at his suggestion, he being an active, energetic business man in whom she had great confidence, he proposing to take care of it, see to the liens and taxes, and sell it for her and account to her for the proceeds, and would charge her for just what his services were worth, and at any time she should want the property back he would convey to her all that remained unsold, no trust being expressed in the deed,—the grandson holds the land in trust for his grandmother, and the statute of frauds will not serve as a cloak for his own fraud when he repudiates the trust and claims title in his own right. In such case, the conveyance will be set aside, except as to such land as the trustee has sold.

From the Marshall Circuit Court.

Giffen et al. v. Taylor.

F. E. Osborn and W. B. Biddle, for appellants.

J. D. McLaren, for appellee.

HOWARD, C. J.—This was an action brought by appellee against appellants, to set aside a deed and to quiet title to real estate, and for damages.

There was a finding of facts by the court, followed by conclusions of law and a judgment in favor of appellee.

The first and second assignments of error, calling in question the sufficiency of the complaint, are presented, as counsel say in their brief, "only out of caution, believing the whole merit of the case can be better raised on the third assignment of error"; and they remark further: "We regard the merits of the case as more readily presentable under the third error assigned,—that the court erred in its conclusions of law upon the special findings."

We agree with the view here taken by counsel, and will only say of the complaint that we find it sufficient.

The facts found specially by the court are, substantially, as follows:

That on the 25th day of April, 1890, the appellee was the owner in fee-simple of the lands described in the complaint, and which are sought to be recovered; that she was a married woman of the age of seventy-eight years, and her husband, John Taylor, was then of the age of eighty-two years, both in moderately good health and of sound mind for persons of their age. The appellee could not write or read writing; but her husband was well-informed in regard to ordinary business transactions, could read and write, and could understand deeds and other instruments relating to the transfer of real estate; that the appellant, Abner Giffen, is the grandson of the appellee and her said husband, and was then twenty-nine years old, the remaining appellant, Ellen,

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being his wife. Before and at said date the appellee had a great affection for Abner, which was reciprocated by him. He had never had any business relations with her, and had never advised her in relation to her property.

In April, 1890, appellee resided with her husband in Bourbon, Marshall county, while the appellant, Abner, was then, and still is, engaged in selling musical instruments and doing a general trading business in that line, traveling over LaPorte, Starke and Marshall counties; and was, and still is, an active, energetic business man; and the appellee had implicit confidence in his honesty and integrity, which was known to Abner, and his demeanor towards her had been of such a character as to justify her in that confidence. She believed him to be of good business tact and capacity. They had met only occasionally for a period of eight years, and for the two years prior to April, 1890, they had not met or communicated with each other.

In April, 1890, the sheriff of Starke county had and held in his hands certain fee bills which he had levied on appellee's said lands, and advertised the same for sale.

On April 25, 1890, appellee went to the house of her son, one Samuel Taylor, in Hamlet, Starke county, in and near which town said lands are situate, to learn the amount and nature of the claims against her land; and while she was at the house of her said son, the appellant Abner met her there, and, after learning of her trouble about her property, proposed to her that if she would deed the property to him, he would take care of it, see to the liens and taxes and sell it for her and account to her for all the proceeds, charging her for just what his services were worth, and at any time she should want the prop-

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erty back he would convey to her all that remained unsold.

On her agreeing to this proposition they went together to Knox, the county seat, and there learned that the only liens against the land were said fee bills, amounting to about \$140. He afterwards informed appellee that he had paid off the fee bills, whereupon she and her husband paid him the amount he had thus expended, and took his receipt. Abner then prepared a deed to himself for all the lands, the nominal consideration being two thousand dollars, but there being no consideration actually paid, which deed appellee and her husband duly executed, all in accordance with the agreement to sell, account for proceeds, and reconvey to her any land unsold whenever she should desire, as hereinbefore set out. No trust was expressed in the deed.

This deed conveyed to said appellant all the property then owned by appellee. Appellee then had, and still has, numerous children and grandchildren. She, with her husband, had, before this time, made a gift of considerable value to said appellant's mother. Some of appellee's descendants were then, and still are, poor people. Appellee did not intend to make a gift of the land conveyed by this deed, but relied on the promise and agreement of said appellant as aforesaid. Said appellant did not, during the pendency of the transaction, make any untruthful or fraudulent representations concerning the property or concerning liens thereon; and up to the time the deed was executed he did not intend to hold the property conveyed to him otherwise than in trust for the appellee, but after the deed was executed and recorded he conceived the idea of holding it as his own.

Before the commencement of this action said appellant had sold three and one-half of said lots for three hundred and fifty dollars; all of which money he con-

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verted to his own use, which sum appellee demanded of him, less his reasonable compensation for making such sales, and she also demanded that he reconvey to her the land unsold, all of which he refused to do; that said lands have not been otherwise sold or encumbered by appellants. A reasonable compensation for said appellant's services is one hundred dollars.

As conclusions of law the court found:

That the deed to appellant, Abner, made by appellee and her husband, ought to be set aside, except as to the lots sold by him; that the remainder of said lands belongs to appellee in fee-simple, and her title thereto should be quieted and the appellants restrained from setting up any title thereto; that a commissioner should be appointed to reconvey said land, and that she should recover of said appellant two hundred and fifty dollars, with interest, and her costs.

Counsel for appellant contend that the facts found do not warrant the conclusions of law; that the facts show only a failure on the part of the appellant to keep his promise; that he was without fault up to the time of receiving the deed; that the idea of claiming the property as his own was conceived only afterwards.

Counsel make no claim that the land rightfully belongs to appellant, but only that he did no wrong up to the time of procuring the deed; in other words, that the wrongful taking of the property and the appropriation of the proceeds to his own use, occurred only after the deed was made, and hence "this breach of contract is not fraud, and would not take the case out of the statute."

It is a salutary maxim that the statute against frauds can not be used as a cover for fraud. The fraud in this case is clear, shameless, and barefaced. A young business man, a favorite grandson, under pretense of aiding

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the old people in caring for their property, proceeds deliberately to appropriate to his own use the whole estate of his aged grandparents; and when called upon to account for the transaction, he coolly informs the court that the statutes enacted to protect innocent holders of real estate from the results of fraud in transfers of title have become for him a shield, under cover of which he proposes to keep his ill-gotten gains. It would be a reproach to the law if such a claim could be allowed.

In *Myers v. Jackson*, 135 Ind. 136, an aged man and wife, as in this case, were induced by a friend to convey their land to him, without consideration, on condition, amongst other things, that he should reconvey to the wife an undivided one-third of the land. There was there, as in the case at bar, no fraud or misrepresentation up to the time of the procuring of the deed; but afterwards, as in this case, the grantee refused to reconvey, and claimed immunity for his wrongdoing under the statute of frauds. This court, however, held, in that case, that the facts showed a resulting trust in favor of the aged wife.

In *Cox v. Arnsmann*, 76 Ind. 210, a father and mother conveyed their land to their son, without consideration, and on condition that he should reconvey to his mother. The court said in that case: "It was always held that the statute of frauds would not be permitted to accomplish a fraud. Our statute of trusts above referred to (section 3391, R. S. 1894; section 2969, R. S. 1881) is, in its first section, substantially a reenactment of the seventh section of the statute of frauds. 29 Charles II Ch. 23. It therefore will not be permitted to accomplish a fraud. If, by virtue of this section, John Arnsmann were permitted to hold the property as his own, his father and mother would lose their property by fraud. To prevent that result, equity raises a constructive trust

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in John Arnsmann, for the benefit of his mother, pursuant to the agreement by which he obtained the deed for the property, and permits that trust to be proved by parol."

See, also, *Tinkler v. Swaynie*, 71 Ind. 562; *Catalani v. Catalani*, 124 Ind. 54; Perry Trusts, sections 226, 227.

There is here no question of the rights of third parties. All persons having any concern in the property, or under the deed or the contract, were before the court to have equity done them; and that equity has been fairly meted out to them by the conclusions of law and the judgment of the court. There can be no doubt that a just and equitable conclusion has been reached.

The judgment is affirmed.

Filed May 16, 1894; petition for a rehearing overruled Dec. 13, 1894.

No. 16,728.

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JUDGMENT.—*Signing by Trial Judge.*—*Presumption.*—*Record.*—*Transcript.*—The transcript of the record need not show that the judgment appealed from was signed by the trial judge, the presumption being in favor of such signing. The judge is only required to sign the record of each day's proceedings once, which may include a great number of judgments.

SPECIAL FINDING.—*Signing by Judge.*—*When Required.*—The law requires a special finding to be signed by the judge, where it is not made a part of the record by bill of exceptions or order of the court.

SAME.—*When Sufficiently Signed.*—*Signature Following Conclusions of Law.*—*Ventre de Novo.*—Where the conclusions of law stated immediately follow the finding of facts, and the judge's signature immediately follows the conclusions of law, if such signature is not a sufficient signing of the special finding, it was a defect in matter of

139	579
139	489
139	579
145	37
139	579
143	620
139	579
164	139

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form, and the remedy was by motion for a *venire de novo*, and, in the absence of such motion, the special finding and conclusions of law are sufficient to present the questions involved in them, on appeal.

NEW TRIAL.—*As of Right.*—*Dismissal of.*—*Effect on Vacated Judgment.*—*Restoration and Conclusiveness of.*—*Case Distinguished.*—The dismissal of a cause of action, after the grant of a new trial as of right, has the effect of restoring the conclusive character of the vacated judgment, against all the parties and their privies, on the ground that it was only vacated for the one purpose under the statute, viz., to allow the defeated party one more trial, if he chose to avail himself thereof. *Carmikel v. Cox*, 58 Ind. 133, distinguished.

JUDGMENT.—*Foreclosure of Mortgage.*—*Res Adjudicata.*—*Assignment for Benefit of Creditors.*—*Bankruptcy.*—*Purchaser Pendente Lite.*—*Collateral Attack.*—A, a corporation, executed a deed of assignment to R. for the benefit of its creditors, among which were certain lots. Subsequently to the assignment, A, upon petition in the United States District Court, was duly adjudged a bankrupt. R., upon order of the State court in which the assignment proceedings were pending, turned over to the assignee in bankruptcy of A all of the property rights, credits and effects of said bankrupt, but made no deed or conveyance of the lots or any of the assigned real estate to the assignee in bankruptcy. The assignee in bankruptcy sold the lots to H. At the time of the assignment by A to R., B. and S. held a judgment lien on the land of A, which, after the sale by the assignee in bankruptcy, they foreclosed and became the purchasers at the foreclosure sale, and received a certificate of purchase, one-half of which they had assigned to F., but which had not been recorded when E., a mortgagee of H., brought suit against H., B. and S. and others to foreclose his mortgage on said lots, which resulted in a judgment in favor of E.

Held, that a decree in a suit to foreclose a mortgage, adjudicating the titles involved, is conclusive upon the parties.

Held, also, that if a judgment necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined the same way in all subsequent actions between the same parties or their privies.

Held, also, that E.'s foreclosure suit necessarily adjudicated two things, viz: (1) That the sale of the lots in question by the assignee in bankruptcy as against B. and S. was valid and binding; and (2) that the sheriff's sale to B. and S. on execution on their judgment was invalid against H., the purchaser at the bankrupt sale.

Held, also, that F., the assignee of B. and S. of one-half interest in the certificate of purchase, should be regarded as a purchaser *pendente lite*, and bound by the decree in favor of E., for such assignment

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had not been recorded, as the statute provides, when E. instituted his suit, having no notice of the assignment.

Held, that as the court, in the foreclosure suit by E., had jurisdiction of the subject and the parties, and the adjudication was within the issues, it is conclusive against a collateral attack, even though the decree be full of errors.

SAME.—Judicial Sale.—Redemption.—Effect on Judgment.—Conclusiveness of Judgment.—The only effect of a sale on a judgment is to satisfy or pay the same, and the only effect of a redemption is to extinguish the sale (not the judgment) by making the payment in money instead of the sale. The judgment, though paid, is a complete bar, and conclusive of everything therein adjudicated.

From the Marion Circuit Court.

W. W. Spencer, E. P. Ferris, F. J. VanVorhis and W. E. Niblack, for appellant.

W. W. Herod, W. P. Herod and O. B. Jameson, for appellees.

McCABE, J.—Suit by the appellant against the appellees Eugene Udell, Fannie Udell and Jennie M. Tompkins, to recover the possession and quiet appellant's title to lots 15, 16, 17 and 18, in block 19, in North Indianapolis, Marion county, Indiana.

The complaint was in a single paragraph, and the issue was formed thereon by separate answers of a general denial by each of the appellees.

A trial resulted in a special finding by the court, on which it stated its conclusion of law, to which appellant excepted, after which the court rendered judgment in accordance with the conclusion of law, for the appellees. The conclusion of law is assigned for error.

The substance of the special finding is, that on the 3d day of December, 1866, the Indianapolis Wagon and Agricultural Works was a manufacturing corporation duly organized under the laws of Indiana, located and doing business in Marion county, Indiana, with a capital stock of \$100,000, in shares of \$50 each, whose cor-

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porate existence was fixed at fifty years; that on October 9, 1873, Thomas F. Ryan and others, then in possession of the premises, conveyed to said Indianapolis Wagon and Agricultural Works, by warranty deed, a large number of lots, among which were those already described, and the deed was recorded May 7, 1874, in the recorder's office of said county.

On October 19, 1876, Robert Browning and George W. Sloan recovered judgment in the superior court of said county against said wagon and agricultural works, for \$479.61 and costs, without relief, etc.; that on November 16, 1876, said company being in embarrassed and failing circumstances, made an assignment for the benefit of all its creditors, and, by deed, conveyed all its property, including the lots in question, to Eli F. Ritter, in trust for the benefit of such creditors, which deed of assignment was duly recorded in the office of the recorder of said county, November 24, 1876.

On the 1st day of December, 1876, said Ritter filed a copy of said assignment in the office of the clerk of the Marion Circuit Court, together with his oath for the faithful discharge of his duties, and that the property assigned had been actually delivered into his possession, and that the probable value thereof was \$7,000.

He filed his bond, took possession of the property, both real and personal, and gave notice of his appointment, and on January 16, 1877, he filed in said clerk's office an inventory and appraisement of all said property. He continued to execute the trust until the 19th day of April, 1877, when he made a report that said wagon and agricultural works had, on March 30, 1877, filed in the district court of the United States for the district of Indiana a voluntary petition in bankruptcy, and was thereupon duly adjudged, on the 6th day of April, 1877, a bankrupt by said court, and further reporting in detail

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items of collections and expenditures, showing a balance in his hands of cash of \$393.05, which at his request the court allowed him to retain for his services, and he asked the court to allow him to turn over to the assignee in bankruptcy of said company all other assets then remaining in his hands, and that he be discharged from any further trust or liability, which request the court granted, and "adjudged the trust closed."

The special finding further shows that the facts thus reported as to the proceedings in bankruptcy were true. Said trustee, Ritter, in compliance with said order, immediately turned over and transferred unto Henry C. Adams, assignee in bankruptcy of said wagon and agricultural works all the property-rights, credits and effects of said bankrupt corporation, but made no deed or conveyance of the lots in controversy here or any of the assigned real estate to said assignee in bankruptcy. Said Ritter from that time ceased to act as such trustee. The schedule filed in said bankrupt proceedings included, among other real estate, the lots mentioned and described above; that on April 21, 1877, John W. Ray, register in bankruptcy, did convey and assign to said Henry C. Adams, assignee, all the estate, real and personal, of the said Indianapolis Wagon and Agricultural Works, including all the property, of whatever kind, of which said bankrupt was possessed, or in which it was interested on the 30th day of March, 1877, excepting such property as is exempt from the operation of the assignment by the provisions of the 14th section of the bankrupt act; that on the 18th day of June, 1878, said Browning & Sloan made proof of their said judgment debt against said bankrupt before the proper register in bankruptcy, and said register admitted and allowed said debt, and he admitted and allowed said Browning & Sloan, as creditors therefor, the sum of \$516. 27, being the principal and

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interest of said judgment; that on a petition filed by the assignee in bankruptcy on April 12, 1879, in said district court, asking an order to sell certain real estate, including the lots in suit, which petition stated that said real estate was incumbered by judgment and taxes, and asking to sell subject to incumbrances, the court made an order of sale in accordance with the prayer of the petition. On the 22d of May, 1879, said assignee reported to said court the sale of the lots in controversy, among others, after advertisement, subject to all incumbrances, to Henry G. Hanneman for \$2, which sale was approved and confirmed by the court, and said assignee was ordered to make said purchaser a deed conveying to said purchaser said bankrupt's interest in said lots. Said Henry C. Adams, as assignee as aforesaid, executed, acknowledged, and delivered unto one Charles B. Hitchcock a deed of conveyance of said lots so reported as sold to said Henry G. Hanneman, which deed bears date the 21st day of May, 1879, and was recorded in the recorder's office of Marion county, Indiana, on the 18th day of July, 1882. The consideration recited in said deed was \$2. The interest conveyed, as expressed in the deed, was "all the right, title and interest of said bankrupt" in the lots, describing them; that on August 12, 1882, Charles B. Hitchcock and wife mortgaged to William H. English all the lots here involved and other real estate to secure a loan of \$800, interest and attorney's fees, and the mortgage was recorded in the said recorder's office, August 17, 1882; that on December 26, 1885, by order of the judgment plaintiffs, an execution was issued on the judgment in favor of Browning & Sloan against said Indianapolis Wagon and Agricultural Works, which execution was received by the sheriff of said Marion county December 26, 1885, and on that day levied on the lots in question. After legal notice said sheriff did, on

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January 23, 1886, at the door of the court house in said county, between the hours prescribed by law, legally offer said lots for sale, and said Browning and Sloan bid therefor the sum of \$300, and, no person bidding more, the same was openly struck off and sold to them, and said purchasers paid the costs and receipted the balance of their bid on the execution as so much paid thereon, and said sheriff executed to said purchasers a certificate of sale of said real estate, and filed a duplicate thereof in the clerk's office in said Marion county. A duplicate of said certificate was recorded in the *lis pendens* record in said clerk's office January 23, 1886; that on the same day said Robert Browning and George W. Sloan, by indorsement in writing, duly acknowledged upon said certificate, reciting the same, for a valuable consideration, assigned to Edwin P. Ferris the undivided one-half interest in said sheriff's certificate, and on February 1, 1887, George W. Sloan assigned his remaining interest in said certificate to Robert Browning, duly acknowledged and indorsed thereon, and on that day, February 1, 1887, both of said assignments were duly recorded in the *lis pendens* record, at the place aforesaid; and on February 2, 1887, the sheriff of said county, on presentation of said certificate, executed a deed to said Browning and Ferris for said lots, which deed was duly recorded in the recorder's office of said county, on November 16, 1887; that on July 27, 1886, William H. English commenced a suit in the superior court of said county for the foreclosure of the mortgage executed to him, as aforesaid, by Charles B. Hitchcock and wife; the defendants to said complaint were said Hitchcock and wife, the Indianapolis Wagon and Agricultural Works, Henry G. Hanne-man and wife, Eli F. Ritter, trustee, the Berkshire Life Insurance Company, Robert Browning, George W. Sloan,

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and many other defendants. Edwin P. Ferris was not a party to that suit. The complaint contained all the averments necessary to entitle the plaintiff therein to a judgment against said Charles B. Hitchcock upon said notes, and a decree of foreclosure against all the defendants and a sale of the mortgaged premises.

It was also alleged in the complaint, that on February 10, 1886, at a public sale of real estate by the treasurer of said Marion county, for taxes, said William H. English purchased said several mortgaged lots, and that said sale for taxes was irregular and invalid, for the reason that said Charles B. Hitchcock, the owner of said mortgaged lots, had personal property out of which said taxes might have been made, but that the amount of said taxes constituted valid liens on said lots.

It was further alleged in said complaint, that all the defendants thereto had, or claimed to have, some interest in said mortgaged property, but that if any interest they had or any of them had in or to said property, the same was junior and subordinate to that of the plaintiff William H. English, and to his said mortgage claim and lien, and the said lien for taxes. A personal judgment of \$3,000 was asked against said Charles B. Hitchcock, and a foreclosure of said mortgage and tax liens against all the defendants, and a sale of the mortgaged property, or so much thereof as should be necessary to pay the liens. The defendants not hereinafter named as answering therein were all properly served with process and were defaulted.

The Berkshire Life Insurance Company answered the complaint of English on September 10, 1886, by a general denial, and, 2, that the company held two judgments against Henry G. Hanneman, rendered in the superior court of said county, for over \$5,000 each, one on December 17, 1878, and the other on September 11,

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1879; that in February, 1877, one Frank McWhinney had purchased the lots at a tax sale, and on February 17, 1879, the auditor of said county had conveyed the lots in suit by a tax deed to said Frank McWhinney, and on December 10, 1879, McWhinney and wife had conveyed the lots to Henry G. Hanneman, and the deeds were recorded, and that their judgments were liens thereon, asking to be protected. English, on October 5, 1886, replied to this answer by a general denial; 2, that the judgments and liens mentioned were fully paid and satisfied before the commencement of that action; and 3, that the deed mentioned from McWhinney was a quitclaim, and at that time McWhinney only had a lien on the lots, but the lien, if any he had, had been assigned to Nathaniel N. Morris through whom plaintiff claims title.

On November 9, 1886, English filed a fourth paragraph of reply to said answer, averring that on August 12, 1882, Hitchcock came to him representing that he owned the lots named in the mortgage free from incumbrances, and asked the loan of money and offered to mortgage; that English had no notice that the insurance company had any lien or claim, when he loaned the money and took the mortgage from Hitchcock, which was done in good faith. He further alleged that Hanneman never owned the lots.

On November 8, 1886, Robert Browning and George W. Sloan filed a disclaimer as to all the lots except those mentioned in the complaint in this suit, and as to those lots, they stated the recovery of the judgment, the execution sale, and the purchase by them, the sheriff's certificate, and the assignment of one-half of the same to Ferris as already stated in this finding above answering only as to one-half of the certificate which they then held and owned.

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On July 14, 1886, the Berkshire Life Insurance Company began a suit against Henry G. Hanneman and wife, Charles B. Hitchcock and wife, and William H. English, in the same court. The complaint stated that said insurance company had recovered the judgments already mentioned against Hanneman, and that Hanneman had conveyed the lots now in suit with others to Hitchcock to defraud Hanneman's creditors, and that Hitchcock held them for Hanneman's benefit, and that the mortgage was made to English for Hanneman's benefit, and that he got the money. Prayer that the lots be sold and the money applied to the payment of plaintiff's claim. Hitchcock and wife, and Hanneman and wife, were served with process in English's foreclosure, and also in the suit by the insurance company, and in each case they were defaulted. English answered the insurance company's complaint on October 5, 1886, by a general denial; 2, that the judgment had been paid; 3, that the mortgage to English was given on August 12, 1882, by Hitchcock and wife to secure notes executed to English by Hitchcock, the mortgage being recorded August 17, 1882, and that Hitchcock was in possession of the lots, and had a deed regularly executed by the former owners of the property, and the money was loaned in good faith, and without notice of Hanneman's interest, and that Hanneman was never the owner of the property, and asked to be protected.

On November 8, 1886, these two causes were, by agreement, consolidated, and on February 10, 1887, they were tried as one cause, resulting in a finding in favor of English for \$953.81, the amount of his mortgage notes, and that the complaint of English was true except as there stated; that English had a lien on the lots for money paid at the tax sale as stated in his complaint; that it was a first lien on the lots, but that English was

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not entitled to a foreclosure of the tax lien, but that the lien should be preserved; and that neither of the judgments set up by the Berkshire Life Insurance Company was a lien on the lots in suit.

The court further found the fact of the execution of the mortgage to English by Hitchcock and wife already mentioned on the lots in suit to secure the loan already mentioned, and that said mortgage lien is a first lien excepting the lien for taxes as aforesaid. The superior court then rendered a judgment foreclosing the mortgage against all the defendants on the lots named in the complaint in the case at bar (with other lots), and rendered a personal judgment against Charles B. Hitchcock for \$963.81 and costs without relief from valuation and appraisement laws, and ordered the lots to be sold to satisfy the decree. An order of sale was afterwards duly issued, and on the 19th day of March, 1887, after proper advertisement, the sheriff sold the whole of the real estate embraced in the mortgage for a sufficient amount to satisfy the English foreclosure decree, not including the tax lien English held.

At said sale the lots now in suit were purchased by English for \$62, which he paid, and received a certificate of purchase, entitling him to a deed at the expiration of one year from its date of March 19, 1887.

On March 17, 1888, the Berkshire Life Insurance Company paid to the clerk of the superior court of said county \$62, and eight per cent. interest thereon, and costs of redemption for the benefit of English for the purpose of redeeming said lots from said sale as owner thereof, which redemption money was accepted and received by English, who thereupon surrendered and canceled his certificate of purchase.

That before making said redemption, and after the rendition of the English foreclosure decree, said Charles

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B. Hitchcock and wife, on the 24th day of May, 1887, by deed conveyed and quitclaimed unto said Berkshire Life Insurance Company said lots as aforesaid mortgaged to said English, including the four lots now in controversy, which deed was duly recorded in the recorder's office of said county.

On January 17, 1888, said Robert Browning and wife executed, acknowledged and delivered unto Edwin P. Ferris their quitclaim deed of the undivided half of the four lots now in controversy, which deed was recorded in the recorder's office of said county on January 18, 1888; that before the execution of the quitclaim deed last mentioned, a certain action was pending in the Morgan Circuit Court on change of venue from the superior court of Marion county, wherein said Robert Browning and Edwin P. Ferris were plaintiffs and said Berkshire Life Insurance Company and others were defendants.

The defendants in the case at bar, viz: Eugene Udell, Fannie Udell and Jennie Tompkins, were not parties to said action in the Morgan Circuit Court. They claim title under said Berkshire Life Insurance Company under deeds subsequently executed as hereinafter shown. The complaint in the Morgan county suit was in one paragraph to quiet title in the plaintiffs. Issues were joined on that complaint, trial, finding and judgment for the defendants, and that the plaintiffs take nothing; that afterwards, on May 25, 1889, the same being the 30th judicial day of the April term, 1889, of said Morgan Circuit Court, the parties appeared, and said Browning and Ferris filed their bond for the payment of costs, together with a motion for a new trial as of right under the statute, which motion was granted and the judgment vacated.

Afterwards, on December 24, 1889, being the 32d judicial day of the November term of said court, said

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Browning and Ferris filed their written dismissal of said cause, and it was thereupon dismissed by the court at the costs of the plaintiffs; that on May 10, 1889, the auditor of Marion county executed to William H. English a tax deed for the lots in controversy, with other lots, 65 in number, reciting the fact that the amount of tax paid on the 65 lots was \$122.75, and that he had since paid taxes thereon to the amount of \$31.56, which amounts are true, as the finding states.

This tax deed was recorded on May 10, 1889, and on that day William H. English, unmarried, quitclaimed to Charles E. Coffin, for \$256.83, the lots named in the complaint, with other lots, and the deed was recorded on September 23, 1889, and on that day said Coffin and wife, for \$260, quitclaimed to the Berkshire Life Insurance Company the 65 lots, including the four lots now in controversy, and the deed was recorded on September 23, 1889.

On December 2, 1889, for the sum of \$500, the Berkshire Life Insurance Company, by warranty deed, conveyed to Fannie W. Udell, wife of her codefendant Eugene Udell, the lots described in the complaint herein, and the deed was recorded on December 24, 1889.

On March 31, 1889, for \$350, the said Fannie W. Udell, with her husband, Eugene Udell, by a warranty deed, conveyed to defendant Jennie M. Tompkins lots 15 and 16, in block 19, named in the complaint herein, and the deed was recorded on April 3, 1891.

Upon the foregoing facts, the conclusion of law stated is "that the law is with the defendants, and that the plaintiff has no title or interest in the real estate mentioned and described in the complaint herein."

A great number of reasons are urged by appellants why the foregoing conclusion of law upon the facts found is erroneous, it being contended by them that the facts

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found, for a great number of reasons, establish title in the appellants.

We are met at the threshold of the investigation of those questions, with objections from the appellees to their consideration.

The first objection is that the transcript does not show that the judgment appealed from had been signed by the trial judge. We have held that the transcript need not show the signing of the judgment by the trial judge, the presumption being in favor of such signing. *Adams v. Lee*, 82 Ind. 587; *Anderson v. Ackerman*, 88 Ind. 481; *State v. Hanna*, 84 Ind. 183.

The judge is not required to sign each judgment as it is rendered, but he is only required to sign the record of each day's proceedings once. That may include a great number of judgments. R. S. 1894, section 1382 (R. S. 1881, section 1330).

The trial judge's signature is no part of the record of any particular cause, but is a part of the record of the whole day's proceedings to which it is attached.

The next objection is that the special finding of facts is not signed by the judge. The conclusion of law stated immediately follows the finding of facts, and the judge's signature immediately follows the conclusion of law.

It is true, as contended by appellees' counsel, that the law requires the special finding to be signed by the judge, where, as here, it is not made a part of the record by bill of exceptions or order of the court. *Peoria Marine, etc., Co. v. Walser*, 22 Ind. 73; *Roberts v. Smith*, 34 Ind. 550; *Conwell v. Clifford*, 45 Ind. 392; *Service v. Gambrel*, 110 Ind. 349; *McCray v. Humes*, 116 Ind. 103; *Wallace v. Kirtley*, 98 Ind. 485.

It can hardly be said that the special finding is not signed at all by the judge because the statute requires him to "first state the facts in writing, and then the

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conclusions of law upon them." R. S. 1894, section 560 (R. S. 1881, section 551). So he is to state both the facts and the conclusions of law in writing. Whether his signature is to immediately follow the statement of the facts, and also the conclusions of law, or whether his signature is to be attached alone to the finding of facts, and not to the conclusions of law, the statute is silent. The practice in many of the trial courts of the State of signing the special finding of facts alone by the judge has been adopted without any signature to the conclusions of law. No good reason is perceived why the signature of the judge may not follow the conclusions of law and constitute a sufficient signing by him of the special finding. At all events if that was not the right place to sign the special finding, then the finding was defective in matter of form. When a special finding is defective in matter of form or contents, the remedy is by a motion for a *venire de novo*. *Kealing v. Vansickle*, 74 Ind. 529; *Parker v. Hubble*, 75 Ind. 580; *Cottrell v. Nixon*, 109 Ind. 378.

No such motion was made. We therefore hold that the special finding and conclusion of law are sufficient to present the questions involved in them.

It is next contended by the appellees that the judgment in the Morgan Circuit Court is conclusive against the appellants, of all the questions sought to be litigated in this case.

Against this position appellant insists that that judgment is ineffective and not conclusive because the same had been vacated and set aside and a new trial granted to the then plaintiffs as a matter of right under the statute, and that they thereafter dismissed their suit. Appellees concede that in ordinary cases the granting of a new trial and the subsequent dismissal of the cause by

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the plaintiffs effectually extinguished the judgment previously recovered in the case. But they insist that in actions like the present, to recover possession of, or quiet title to, real estate where the statute confers the right on the defeated party to demand the vacation of the judgment in order that he may have one more trial regardless of the merits of the cause, the plaintiff, obtaining such an order, can not proceed to use it for an entirely different purpose by dismissing a suit the merits of which have once on a fair trial been determined against him, and which he fears will be determined the same way on a second trial.

Under a statute very similar to ours it has been held that such a dismissal, after the grant of a new trial as of right, has the effect of restoring the conclusive character of the vacated judgment, on the ground that it was only vacated for the one purpose under the statute, and that was to allow the defeated plaintiff one more trial, and only one, if he chose to avail himself thereof; and if he did not so choose, he must be held bound by the previous judgment, and abide by it. *Cunningham v. City of Milwaukee*, 13 Wis. 133; *Fraser v. Weller*, 6 McLean, 11.

These decisions commend themselves to our sense of justice and right. A contrary ruling would turn a statute intended as a shield against mistakes in the trial of real estate cases, by permitting one new trial without cause, into a sword of wrong and oppression, by which a plaintiff might get any number of trials of the same matter. The Legislature certainly never intended any such a thing.

But it is contended by the appellant that a contrary rule upon this question has been established in this State by this court in *Carmikel v. Cox*, 58 Ind. 133.

That case is distinguishable from the cases just cited and from the case at bar. In that case the defendants

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were present in court, and, as this court construed the record, practically and in effect consented to the dismissal. Here the defendants were not in court when the dismissal was entered, and they could not, therefore, either object or consent to such dismissal.

Therefore the judgment against the plaintiffs in the Morgan Circuit Court was conclusive against all the parties to it, and their privies as to the question of title to the lots now in question. Ferris was a party to that suit, he then claimed a one-half interest in said lots, and he has since purchased the interest of his then coplaintiff Browning in the other half. As to that half he is a privy to the judgment as against Browning; and is bound by it the same as if he had held Browning's interest when that judgment was rendered. This result would be sufficient to justify the conclusion of law. But there is another good ground on which to rest the conclusion of law.

It is contended with great earnestness that the deed of assignment by which the Indianapolis Wagon and Agricultural Works conveyed the lots in question, with others, and their property rights, credits and effects to Eli F. Ritter, for the benefit of their creditors, was effectual to convey the title to the lots in question to him, subject to the lien of their prior judgment, and that the subsequent adjudication of bankruptcy against said Indianapolis Wagon and Agricultural Works did not avoid the previous assignment by that corporation to said Ritter for the benefit of its creditors, and though the State court ordered him to turn over all the property and assets of said insolvent corporation to its assignee in bankruptcy, which he did, as far as he could, except he made no deed or writing conveying or attempting to convey said lots to said assignee in bankruptcy, and therefore it is contended by appellant that the title to said lots remained

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in Ritter, the assignee and trustee, under the State law, and that said lots never came under the jurisdiction of the bankrupt court, and that the register in bankruptcy only having attempted to convey such property to the assignee in bankruptcy as the bankrupt owned on the day of his adjudication as a bankrupt, viz., March 30, 1877, which was long after the title to the lots had been conveyed to and vested in Ritter, the assignee and trustee under the State law.

It is therefore contended by the appellant that the attempted conveyance of said lots by the assignee in bankruptcy under the order of the bankrupt court was a mere nullity, and the title derived through the subsequent conveyances by the grantees of the assignee in bankruptcy is also ineffective and void.

And it is further contended that the proof of the judgment debt of Browning and Sloan against said wagon and agricultural works before the register in bankruptcy, the same being a corporation, did not extinguish their judgment or waive the lien thereof; and that the subsequent execution thereon and sheriff's sale and deed thereunder conveyed a good title to the lots in question, and that the appellant holds that title by virtue of the subsequent assignments and conveyances set forth in the special finding.

Conceding, without deciding, that appellant is fully justified by the law in his contention for each one of the positions thus assumed, still the appellees contend that appellant is concluded and estopped from setting up and enforcing such title by other facts found in the special finding.

Browning and Sloan were made parties defendant to English's foreclosure suit, on the alleged ground that they claimed some interest, and they answered disclaiming as to all the lots except one-half of the four now in

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controversy, setting up their judgment execution, sheriff's sale and certificate, and that they had assigned one-half of the certificate to Ferris, but this assignment had not been recorded when English began his foreclosure suit. English's right to foreclose against Browning and Sloan depended entirely on the validity of the sale of the lots by the assignee in bankruptcy as against the sheriff's sale to Browning and Sloan.

If the assignee's sale was not binding on Browning and Sloan, then the court could not legally adjudge a foreclosure of English's mortgage against Browning and Sloan, because English's mortgage was made by one whose title was derived wholly through the sale of the assignee in bankruptcy. Therefore, two things must necessarily have been adjudicated and adjudged in English's foreclosure suit before the decree of foreclosure could be, as it was, entered against Browning and Sloan, viz:

1. That the sale of the lots in question by the assignee in bankruptcy as against Browning and Sloan was valid and binding.

2. That the sheriff's sale to Browning and Sloan on the execution on their judgment was invalid against Hitchcock, the purchaser at the bankrupt sale.

"Every point which * * must necessarily have been decided in order to support the judgment or decree is concluded. * * If a judgment necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined in the same way in all subsequent actions between the same parties." 1 Freeman Judgments (4th ed.), section 257.

Generally, a judgment is conclusive only between adversary parties. 12 Am. and Eng. Encyc. of Law, 83 and 84, and authorities there cited.

Hitchcock, under whom appellees claim, was not an

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adversary party to Browning and Sloan on the record in the English foreclosure suit, but he was a codefendant with them. Yet English was an adverse party to them and he necessarily had to assert and maintain the validity of the Hitchcock title derived from the bankrupt sale and the invalidity of Browning and Sloan's title, and he was in privity with Hitchcock in that contest. The Hitchcock title and the Browning and Sloan title were adverse and conflicting claims, and in that contest Hitchcock's interest was adverse to that of Browning and Sloan, though he was a codefendant with them. Besides, it is settled law in this State and in other States that a decree in a suit to foreclose a mortgage adjudicating the titles involved is conclusive upon the parties. *Bundy v. Cunningham*, 107 Ind. 360; *Masters v. Templeton*, 92 Ind. 447; 1 Freeman Judg. (4th ed.), section 303, *O'Brien v. Moffitt*, 133 Ind. 660 (667).

It is true the appellant Ferris was not a party to the English foreclosure suit, but he purchased one-half of the interest in the lots of Browning and Sloan since that litigation. As to that interest he is a privy with them and is equally bound with them by that decree as to that interest. When English began the suit, Ferris held an assignment of one-half of the Browning and Sloan certificate of sheriff's sale, but such assignment had not been recorded as the statute provides. R. S. 1894, section 778; R. S. 1881, section 766.

English had no notice of such assignment when he brought his foreclosure suit, though he received such notice pending that litigation.

Under such circumstances Ferris is regarded by the law as a purchaser *pendente lite* and equally bound by the decree with the parties. *Boice v. Michigan, etc., Life Ins. Co.*, 114 Ind. 480; *Adair v. Mergentheim*, 114 Ind. 303;

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Wilters Mortgage Foreclosures, section 42, page 97; Bennett Lis Pendens, section 333, p. 380.

It makes no difference whether the court erred in the foreclosure decree or not. If it did so err, the sole remedy was by appeal. Though the decree is full of errors it is nevertheless binding and conclusive when brought collaterally in question, as it is here, so long as the court had jurisdiction of the subject and the parties and the adjudication was within the issues, all of which was the case here. The appellant was, therefore, estopped and concluded by the decree from setting up the title he asserts.

It is contended by the appellant that the redemption from English's foreclosure sale extinguished the decree, and therefore its conclusive character was destroyed. The only effect of a sale on the judgment is to satisfy or pay the same, and the only effect of a redemption is to extinguish the sale by making the payment in money instead of the sale.

The judgment is not extinguished by a sale or satisfaction. Its conclusiveness remains unaffected thereby; otherwise a second recovery might be had for the same cause. The judgment, though paid, is a complete bar and conclusive of everything therein adjudicated. There was no error in the conclusion of law that appellant had no title.

The judgment is affirmed.

HACKNEY, J., took no part in this decision.

Filed Sept. 27, 1894; petition for a rehearing overruled Dec. 19, 1894.

 Bruner, Receiver of the Crawfordsville Waterworks Co., v. Brown.

No. 17,120.

**BRUNER, RECEIVER OF THE CRAWFORDSVILLE WATER-
WORKS COMPANY, v. BROWN.**

CORPORATION.—Promoter's Contract.—Ratification of.—A contract made by the promoters of a corporation previous to its organization, and ratified and confirmed by it afterwards, is binding upon the corporation.

SAME.—Contracts with Promoters.—Payment of Promoter's Services.—Purchase of Property from.—A corporation has the right to make contracts with its promoters to pay them for their services and to purchase property from them.

SAME.—Contract.—Construction of Waterworks in Consideration of Stock and Bonds.—Value of Stock.—Action by Receiver.—Fraud.—Where a contract is entered into between a waterworks company, which at the time has no indebtedness, and another, whereby the latter, in consideration of the construction of the waterworks plant, receives a certain amount in bonds and a certain amount in paid up stock, and a statement is filed in the county clerk's office showing that the stock is paid up by the execution of the contract for the construction of the works, in pursuance of section 3861, R. S. 1881, thereby giving notice to all concerned, a receiver of the corporation, suing for the benefit of creditors, can not recover from a holder the value of the stock unless the fact of fraud in the transaction is proved and found.

From the Montgomery Circuit Court.

S. C. Kennedy, H. J. Milligan and P. S. Kennedy, for appellant.

C. Martindale, B. Crane and A. B. Anderson, for appellee.

DAILEY, J.—This is an action in which the appellant seeks to recover, for the benefit of the creditors of the Crawfordsville Waterworks Company, a judgment against the appellee on a claim alleged to be due from appellee as a holder of alleged unpaid stock in that corporation. The complaint is in two paragraphs, the first of which is for the collection of the par value of \$20,000 of stock of

139	600
149	611
150	186
150	191
139	600
154	89
139	600
158	405
139	600
170	694
170	695

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said company, which it is claimed the defendant owns, and for which it is alleged nothing has ever been paid to the company.

The second paragraph is to collect upon a subscription of \$1,000 of the stock of the Crawfordsville Waterworks Company made by the appellee.

The defendant answered that the \$20,000 of stock had been paid for, setting forth the manner in which the same was paid; and also answered that the one thousand dollar subscription to the stock of the company had been paid, setting forth the manner in which the same was paid.

Issues having been made up, the case was submitted to the court for trial, and the court, at the request of the appellant, made a special finding of facts and stated its conclusion thereon, that the plaintiff should recover nothing on either paragraph of his complaint.

As the record is presented to this court, there is but one question that can be properly considered by us, which is: "Did the trial court err in its conclusion of law upon the facts found?" The special finding of facts is quite voluminous, and it is not essential to this opinion that we should embody herein a synopsis of its contents. From the facts found by the court, it appears that the appellee, at the time of the formation of the Crawfordsville Waterworks Company, subscribed for \$1,000 of the stock therein, and afterwards became the owner by transfer from Comegys & Lewis, who under contract had constructed the entire waterworks plant of said company, of \$20,000 additional stock, making \$21,000 of stock held by the appellee in the corporation. In regard to the \$1,000 subscription to the stock of the company made by the appellee, it is the contention of the appellant that the appellee will not be permitted to avoid the responsibility which he publicly assumed by the act,

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having thereby presumably induced persons to deal with and extend credit to the corporation on the faith of the transaction.

It seems from the record that the appellee and Robert B. F. Peirce and Elijah B. Martindale had obtained from the city of Crawfordsville a franchise to construct waterworks in said city. The franchise belonged to them individually, and not to the Crawfordsville Waterworks Company. They agreed to organize the company, each subscribing \$1,000, and to turn the franchise over to the corporation and to do likewise with other contracts they made in relation to the building of waterworks in payment of their subscription to the company. As soon as the company was formed, a resolution was passed by the directors ratifying this agreement. The effect of this contract was that the corporation gave to Brown \$1,000 for his interest in the franchise to construct the waterworks in the city of Crawfordsville, which interest was worth more than one thousand dollars, the whole franchise being worth four thousand dollars. It is the law that a contract made by the promoters of a corporation previous to its organization, which is ratified and confirmed by the corporation, after its organization, is as binding as any contract which the organization can make. Corporations have a right to make contracts with the promoters to pay them for their services and to purchase property from them. *Stanton v. N. Y., etc., R. W. Co.*, 59 Conn. 272; *Whitney v. Wyman*, 101 U. S. 392; *Touche v. Metropolitan, etc., Co.*, 6 Ch. App. Cas. L. R. 671; *Bommer v. American, etc., Co.*, 81 N. Y. 468; *Davis v. Montgomery, etc., Co.*, 8 So. Rep. 496; *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St. 54; *Morawetz Priv. Corp.*, sections 545-548.

The chief point of contest in this appeal is upon the payment for the \$20,000 of stock held by the defendant.

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This stock was received by the defendant from Comegys & Lewis, of New York, the contractors who built the waterworks, as fully paid up stock from the corporation. The corporation had entered into a contract with them by which they were given \$150,000 of the first mortgage bonds of the company and \$197,000 of the stock of the company fully paid up, in payment for the construction of the works.

In the case of *Coffin v. Ransdell*, 110 Ind. 417, and *State, ex rel., v. Sullivan*, 120 Ind. 197, it was held that the receiver of a corporation is bound precisely as it is bound, and occupies the relation to the stockholders that the corporation itself, if waging the suit in its own person, would occupy. This is true although the receiver represents the creditors as well as the stockholders.

In considering the questions involved in this case, we recognize the following well settled principles:

1st. The capital stock of a corporation is a trust fund for the payment of its creditors. *Sawyer v. Hoag*, 84 U. S. (17 Wall.) 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Morgan Co. v. Allen*, 103 U. S. 498; *Jackson v. Traer*, 64 Iowa, 469.

2d. Capital stock, being a trust fund, may be followed by creditors in any court of equity into the hands of every person who is not a *bona fide* purchaser thereof for value without notice, and such person may be held as trustee to the extent of the trust fund in his hands. *Wood v. Dummer*, 3 Mason, 308 (312); *Curran v. State of Arkansas*, 56 U. S. (15 Howard) 304; *Taylor v. Bowker*, 111 U. S. 110.

3d. A simulated payment of stock is not valid as against creditors. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

4th. The directors of a corporation have no power to release a subscriber to its capital stock to the prejudice

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of its creditors. *Burke v. Smith*, 83 U. S. (16 Wall.) 395; *Rider v. Morrison*, 54 Md. 429; *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 37; *Hawley v. Upton*, 102 U. S. 314; *Webster v. Upton*, 91 U. S. 65.

5th. An agreement between a corporation and its stockholders that the stock shall be considered fully paid and nonassessable is binding on the corporation, and estops it from making any further calls on the stockholders. But if the corporation become insolvent, such agreement does not estop unsatisfied judgment creditors of the corporation from subjecting the unpaid balance on the stock to the payment of their judgments. *Scovill v. Thayer*, 105 U. S. 143; *Drury v. Cross*, 74 U. S. (7 Wall.) 299; *Jackson v. Ludeling*, 88 U. S. (21 Wall.) 616.

Having regard for these principles and such others as are applicable to this case, we will briefly examine the facts as they are disclosed by the record.

It is clearly found by the court that at the time the contract between the waterworks company and Comegys & Lewis was entered into, the corporation had no indebtedness; that every person who had any interest therein had actual knowledge of everything pertaining to the transaction; that a statement was filed in the office of the clerk of the Montgomery Circuit Court in pursuance of section 3861, R. S. 1881; Burns R. S. 1894, section 5062, showing the manner in which the stock was paid up by the execution of the contract for the consideration of the works, so that every one thereafter dealing with the corporation had notice of this transaction. The certificate so filed was a public record required by statute. It was an act done in a public office, open for the information of all parties interested. As such, they were bound to take notice of it. *Maddux v. Atkins*, 88 Ind. 74; *Sanders v. Muegge*, 91 Ind. 214.

This rests upon the doctrine of presumptions; for it

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is a presumption of law that every one will take care of his own concerns; thus the owner and vendor shall be presumed to know of the patent defects in the thing sold. *Lane v. Shears*, 1 Wend. 434; 1 Phillips on Ev. 500, section 606.

It has been held that creditors can not complain that a transaction by a corporation prior to the creation of their claims, and of which they are presumed to have had notice, was fraudulent as to creditors. *Rollins v. Shaver Wagon, etc., Co.* (Iowa), 45 N.W. Rep. 1037 (1040); *Walburn v. Chenault*, 43 Kan. 352.

The case of *Coffin v. Ransdell*, *supra*, announces two distinct propositions applicable to this case:

1. That any property which a corporation is authorized to purchase, or which is necessary for the purpose of its legitimate business, may be received in payment for its stock.

2. That a transaction by which property is given to a corporation in payment for stock, is binding so long as it is not impeached by the corporation or its assignee, and it can be impeached only for fraud upon the corporation.

There is a long line of decisions that support the doctrine as stated and upholds the principle declared in *Coffin v. Ransdell*, *supra*.

In *Fogg v. Blair*, 139 U. S. 118, there was a contract between Blair and a railroad corporation by which Blair took stock and bonds for the construction of the road. The bill alleged that the work was not worth more than the bonds, and that there was no consideration paid for the stock, and that the agreement was only colorable, and a means to get the stock for nothing, and was a fraud on creditors. This is the identical theory assumed by the learned counsel in the case at bar. The prayer was that Blair be compelled to pay the par value of the stock.

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The court held that a demurrer to the bill was properly sustained, because it was not shown that the stock had any value. The court said: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair & Taylor." The value of the stock is the essential thing to be proved in such an action.

In *Clark v. Bever*, 139 U. S. 96, the defendant held a claim for construction against a railroad amounting to \$70,000. He accepted in payment stock at twenty cents on the dollar, or \$350,000. A creditor brought suit asking that he be compelled to pay the balance on his judgment. It was held that as the stock was, at the time of the transfer to defendant by the company, of no market value, the transaction was fair, and there was no liability.

In *Handley v. Stutz*, 139 U. S. 417, the facts were thus stated in the opinion: "Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig-iron. To embark in this, however, money was needed, and as the stock of the company was not worth more than fifty cents on the dollar, it was evident that this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of \$50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the

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suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased eight hundred shares, five hundred of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration." The transaction was upheld in an exhaustive opinion.

In *Bickley v. Schlag*, 46 N. J. Eq. 533, the chancellor says: "The inquiry, therefore, in the court below, should have been, whether the agreement in question was fraudulent or not; for, if the transaction was an honest one, the difference in value between the property constituting the consideration of the sale and the stock had no legal significance. The character of this company authorizes the corporation to exchange its capital stock for property, and, under that condition of things, a court of equity can not set aside a transaction of that kind simply on the ground that the bargain, on the side of the corporation, is a disadvantageous one. In such affairs the company and the purchaser stand on the common footing of buyer and seller; the valuations of property in making the exchange, either on the one side or the other, can not be supervised or controlled by the court of chancery, for, in the absence of deceit, or some other corrupt constituent, the bargain between the parties can not be disturbed. In the present instance fraud was not found, and the vice-chancellor ordered these stockholders to pay more than they had agreed to pay for the stock, on the ground that, in his opinion, the steamboats and other things they had exchanged were not worth as much as the stock was worth. Conspicuously the substance of the true issue has been overlooked." The case was reversed for the reason the trial court failed to find any fraud or deceit in the transaction.

In *Du Pont v. Tilden*, 42 Fed. Rep. 87, the United

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States Circuit Court cited and followed the case of *Coffin v. Ransdell*, *supra*.

These propositions are also sustained in *Mallinckrodt Chem. Works v. Belleville Glass Co.*, 34 Ill. App. 404; *Whitehill v. Jacobs*, 75 Wis. 474; *First Nat'l Bank, etc., v. Gustin, etc., Mining Co.*, 42 Minn. 327.

In the last case the court said: "While the courts have not always had occasion to state the limitations upon the doctrine that 'the capital is a trust fund for the benefit of creditors,' yet we think that it will be found that in every instance where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors, *who have dealt with the corporation with full knowledge of the facts*. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors. * * This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security * than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders and not on the creditors."

This proposition is upheld in *Walburn v. Chenault*, 43 Kan. 352; *Callanan v. Windsor*, 78 Iowa, 193, and in *Knoop v. Bohmrich*, 49 N. J. Ch. 82, 23 Atl. Rep. 118.

It is impossible to separate the consideration in the contract between Comegys & Lewis, and the waterworks

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company, and hold that the \$150,000 of bonds were given in consideration of the construction of the works, and that the stock was turned over to Comegys & Lewis without any consideration. The contract was an entirety. The consideration on both sides was entire. On the part of Comegys & Lewis, it was the building of the waterworks. On the part of the company it was the stock and bonds. It would be absurd, under the circumstances, to say that the stock was the consideration and the bonds were a gift, or that the bonds were the consideration and the stock was a gift. This suit was instituted upon the theory that nothing had been paid for the stock.

The special finding of facts shows that a valid contract was made by which certain property which the company had a right to acquire and use in its business, was turned over to the company in payment for its stock, and this contract was fully executed on both sides. There is nothing in the special finding of facts tending to show that there has been any fraud to vitiate the contract and this court can not presume a condition to exist that does not so appear.

In *Parke County Coal Co. v. Terre Haute, etc., Co.*, 129 Ind. 73 (81), the well-established doctrine was announced, that the burden is upon the appellant to prove fraud. It is the rule in this State that fraud is never presumed, but must be proven, and the presumption is always against bad faith. *Stiz v. Sadler*, 109 Ind. 254 (258); *Wallace v. Mattice*, 118 Ind. 59; *Stewart v. English*, 6 Ind. 176; *Morgan v. Olvey*, 53 Ind. 6.

There is no such thing in Indiana as fraud in law in transactions of this kind. Fraud, actual or constructive, is a question of fact. *Rose v. Colter*, 76 Ind. 590; *Cicero Tp. v. Picken*, 122 Ind. 260 (263); *Phelps v. Smith*, 116

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Ind. 387 (393-4); *Caldwell v. Boyd*, 109 Ind. 447 (455-6); Burns R. S. 1894, sections 6645 and 6649.

The special finding must state ultimate facts not evidence.

"Where fraud is essential to the existence of a cause of action it must be found and stated in the special finding as a substantive fact or the plaintiff will suffer defeat." *Wilson v. Campbell*, 119 Ind. 286 (289-290); *Citizens' Bank v. Bolen*, 121 Ind. 301 (305); *Bartholomew v. Pierson*, 112 Ind. 430 (432).

These principles apply as well to contracts and transactions, such as the one under consideration, as to conveyances, as is shown in *Caldwell v. Boyd*, *supra*, which was a case involving a trust.

This court so held in *Farmers' Loan, etc., Co. v. Canada, etc., R. W. Co.*, 127 Ind. 250, being an action involving a contract between a railroad company and a construction company, wherein the former agreed to pay the latter with its stock and bonds. On page 269, the court said: "Cross-errors alleged by some of the appellees, present questions which require consideration. The first of these questions arises on the claim put forward by counsel that the transaction between the Burns Construction Company and the railway company was a fraud upon the rights of the creditors. While there are circumstances indicative of fraud, there is no finding that there was fraud in fact, and hence the complaining appellees are not entitled to judgment, upon the ground that the transaction was a fraud upon their rights. It is settled by our decisions that fraud must be found and stated as an inferential or ultimate fact, and that it is not sufficient to state badges of fraud, or the evidences of fraud, in a special finding."

In *Parke County Coal Co. v. Terre Haute, etc., Co.*, *supra*, it was held that the burden is upon the appellant to prove

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fraud; that the finding being silent on the subject of fraud, the conclusion follows that none exists, and that none was proven.

It seems well settled that when a finding is silent upon a fact material to be found, it is to be taken as found against the party having the burden of proving such fact. *Brazil, etc., Coal Co. v. Hoodlet*, 129 Ind. 327; *Westfield, etc., Co. v. Abernathy*, 8 Ind. App. 73.

Where the special findings made by the court indicate perfect good faith, and the presumption of good faith is not impeached by any finding or conclusion, we can not reverse the judgment of the lower court. It is only in cases where the trial court has found as a substantive fact that the transaction was infected with fraud that the courts of appeal will denounce contracts by which property has been transferred to a corporation at a gross overvaluation.

The judgment is affirmed.

Filed Oct. 11, 1894; petition for rehearing overruled Dec. 20, 1894.

No. 16,899.

THE BOARD OF COMMISSIONERS OF JACKSON COUNTY v.
NICHOLS.

BRIDGE.—*Defective.*—*Negligence.*—*Watercourse.*—*Stream.*—*Pleading.*—

The mere allegation of the name of a stream will not supply an allegation that it is a watercourse, but an allegation that a bridge spanned a stream shows that it was over a watercourse.

SAME.—*Complaint.*—*Motion to Make Specific.*—Where a complaint to recover for injuries caused by a defective bridge alleges that "the plaintiff and her husband were driving," a motion to make it more specific by alleging which one was driving will not lie.

SAME.—*Location of Bridge.*—An allegation that the defective bridge

139	611
143	151
139	611
151	497
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171	611

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constituted a part of a public highway "leading into the city of Seymour," and "at or near the city limits on the south of said city," shows that the bridge is not within the city.

SAME.—Maintenance of Bridge.—Duty of County.—The fact that a bridge is within a township does not of itself exempt the county from its obligation to keep it safe, and an allegation that the bridge was constructed by the county shows that it is not a township bridge.

SAME.—Construction of Bridge.—Record of Not Essential to Liability.—If a bridge is one which it is the statutory duty of the county to maintain, a breach of the duty, resulting in injury, renders the county liable without reference to when or by whom it was constructed, or whether there is a record of its construction.

SAME.—Use of Highway and Bridge in Night Time.—Contributory Negligence.—One using care is not guilty of negligence in driving in the night time along a highway with which he is not familiar, and going upon a bridge which is a part thereof.

SAME.—Character of Injury.—A complaint to recover damages for several specific personal injuries is not bad because a part of the injuries alleged could not have been caused by the defendant's negligence.

SAME.—Bridges Over Natural and Artificial Watercourses.—The statutory duty of counties to maintain bridges is not limited but includes both natural and artificial watercourses.

SAME.—Filing Claim with Commissioners.—Proof of by Plaintiff not Necessary.—One who sues a county for personal injuries is not bound to prove that the claim had been filed for allowance before the county commissioners prior to bringing the action.

SAME.—Size of Bridge.—County Liability not Determined by.—The duty of a county in the maintenance of bridges is not determined by the size or length of the bridge, and proof that a bridge was one the chord of which was less than twenty-five feet is not in itself sufficient to exempt the county from liability.

SAME.—Construction of Bridge.—Part Payment by City.—Duty to Maintain.—The fact alone that a city paid a part of the cost of building a bridge neither subjects it to city control nor diminishes the interest or duty of the county as to the bridge.

EVIDENCE.—Personal Injuries.—Declarations of Pain.—Declarations of pain and suffering by an injured person after the injury is sustained and up to the time of bringing an action therefor, are competent evidence.

PLEADING.—Answer.—Specific Denials.—Demurrer.—An answer setting out specific denials of the cause of action is bad on demurrer when a general denial is pleaded, under which the same proof may be made.

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JURY.—Viewing Premises.—Discretion of Court.—In order to make the refusal of the trial court to let the jury view the scene of an accident available error it must be shown that there was an abuse of discretion.

INSTRUCTIONS.—Refusal to Give.—When not Available Error.—Unless the record shows that it contains all of the instructions given no available error can be based on the court's refusal to give instructions asked.

INTERROGATORIES TO JURY.—Untrue Answers.—Remedy.—That answers to interrogatories are untrue or not supported by the evidence is no reason for returning them to the jury for further answers, but such fact can only be taken advantage of by a motion for a new trial, made in determining whether the general verdict is supported by the evidence.

PRACTICE.—Joint Motion.—Must be Good as to all it Embraces.—No error can be based upon the overruling of a joint motion unless it is good as to all the matters embraced therein.

From the Orange Circuit Court.

B. H. Burrell, W. Farrell and M. S. Mavity, for appellant.

N. Munden, for appellee.

HACKNEY, C. J.—The appellant prosecutes this appeal from a judgment of the circuit court in favor of the appellee, on account of personal injuries alleged to have been sustained from the defective construction of a highway bridge in Jackson county.

The first alleged error presented is the action of the lower court in overruling appellant's motion to require the complaint to be made more specific. The first specification of the motion asked that the complaint allege the name of the stream over which said bridge was constructed. The argument is that no authority existed to construct, and there was no duty to repair bridges, excepting those over a stream or watercourse, and that without the name of the stream it could not be learned that the bridge in question was one over which the appellant had control. We are unable to believe that the

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name would determine the question urged by the appellant. If the premises stated were correct, the name would not supply the place of an affirmative allegation that the bridge spanned a watercourse.

The second specification asks that the complaint allege who was driving the team at the time of the accident. The purpose of the fact sought, it is said, was to enable the appellant to impute the possible negligence of the driver to the appellee. The complaint alleged that "the plaintiff and her husband, Willard Nichols, a good and careful teamster, were driving." While it may appear to have been unusual for two persons to be engaged at one time in driving a team of horses, it is, nevertheless, so alleged, and it is never the province of the court to require a fact stated to be denied or cast in doubt by adding a contradictory fact. If both were driving, and the appellee was required to negative the possible negligence of her husband, the proposition would arise upon demurrer, and not upon the motion.

The third specification sought to have the location of the bridge stated, "whether in the city of Seymour or in the township of Jackson." The object claimed for this specification was to enable the appellant to learn whether the bridge was one that the city should maintain or one that the township was required to maintain.

It was alleged that the bridge formed and constituted a part of a public highway "leading into the city of Seymour," and "at or near the city limits on the south of said city of Seymour."

From this allegation, it appears sufficiently that the bridge was not within the city. If within a township that fact would not, of itself, exempt the county from its obligation to maintain it in a condition of safety for public travel. *Board, etc., v. Sisson*, 2 Ind. App. 311; *Vaught v. Board, etc.*, 101 Ind. 123; *Board, etc., v. Ar-*

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nett, 116 Ind. 438; *Board, etc., v. Washington Tp.*, 121 Ind. 379.

The fourth specification sought the date of the construction of the bridge by the county. This specification is not urged with seriousness, and the fifth is conceded to be the same as the third. We find no error in ruling upon the motion.

It is next insisted that the court erred in overruling appellant's demurrer to the complaint.

It is first urged that as the appellant can only act and speak by its record, it was necessary to allege that the bridge in question was located and constructed pursuant to proceedings regularly conducted and recorded. If the bridge was one which the appellant was authorized to construct, it became its duty, under the statute, R. S. 1894, sections 3275, 3282 (R. S. 1881, sections 2885, 2892), to maintain it in a condition of reasonable safety for public travel, without regard to the question as to when or by whom it was constructed, or whether there was a record of its construction. *Board, etc., v. Bailey*, 122 Ind. 46; *Board, etc., v. Brod*, 3 Ind. App. 585; *Board, etc., v. Castetter*, 7 Ind. App. 309; *Board, etc., v. Blair*, 8 Ind. App. 574.

The duty expressly enjoined by the statute is not upon the condition that the county proceeded regularly to construct the bridge. If one is injured by a neglect of this duty, a liability can not be made to depend upon the condition of the records of the county board, for a neglect in the recording would permit the board to excuse itself from liability for one act of negligence by showing that it had been guilty of another act of equal negligence.

Again the appellant insists that it was necessary to allege facts showing that the bridge was not one over which the township had control. This proposition is

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fully answered by the cases first cited in this opinion. However, it is expressly alleged that the bridge in question was constructed by the appellant, and there is no room for the presumption that it may have been a township bridge.

It is suggested that the complaint should have alleged that the bridge in question was over a watercourse. The pleading was not drawn with care, but it appeared with sufficient certainty that the bridge was over a stream. In the sense in which the word is employed in the pleading it can have but one meaning, and that is a continuous course of flowing water. As such it is a watercourse, and, as said in *Board, etc., v. Wagner, Admr.*, 138 Ind. 609, whether natural or artificial, it is within the meaning of the statutes above cited.

It was alleged that the bridge was forty feet in length and but twelve feet in width, and without guards or balustrades; that the appellee was proceeding across the same in the night time and while it was dark, and not having any knowledge of the existence of said bridge, though proceeding without fault on her part, one of the horses fell over the side of said bridge and drew the wheels on the left side of the wagon off the bridge, throwing the appellee out into the stream below, and inflicting the injuries complained of. In addition it is alleged that "she was in all things careful and cautious, and in no way at fault."

Appellant's counsel insist that the facts so specially pleaded show contributory negligence on the part of the appellee overcoming the general allegation of noncontributory negligence. The special fact urged as contributory negligence is in traveling a strange road in the darkness of the night. One is not required to forego traveling upon a public highway or bridge even if he have knowledge of dangers in so doing, and his duty is to

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use care in proportion to the known dangers, and the degree of the care used is a question for the jury. *Board, etc., v. Castetter, supra; Henry County, etc., Co. v. Jackson, 86 Ind. 111; Jonesboro, etc., Co. v. Baldwin, 57 Ind. 86.*

It must be conceded that public highways and bridges are constructed for use by both day time and night time, and by those acquainted as well as those unacquainted with them, and if those acquainted with the dangers of a bridge need not forego its use much less should one not acquainted with such dangers.

The allegation is that she exercised care and was free from negligence. We can not say, in the face of this allegation, that she proceeded with undue speed; that she did not exert her faculties of sight, or that she failed to do anything that prudence would suggest. We can only say that she did not forego traveling over the bridge, and this of itself was not necessarily negligence.

The complaint describes appellee's injuries from the fall as follows: "Wounding and bruising her about the face, body and limbs, and injuring permanently the organs of the abdominal cavity, and especially did she, in said fall, sustain great and permanent injury to her womb and ovaries and to her spine and to her nervous system generally."

From these numerous distinct injuries the appellant's counsel set apart that alleged to have resulted to the womb and ovaries, and insist that those organs are so shielded as to make it impossible that they should be injured in the manner alleged, and from such premises it is concluded that the complaint states no cause of action. If we were to concede the premises we should find it difficult to overlook or brush aside the several other serious injuries alleged. What reason may exist for the conclusion that such other injuries, if not accompanied by that criticised, would not furnish the basis for dam-

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ages counsel have not advised us, and we confess that we have not detected.

It is objected further that the complaint does not connect the injuries with the defective condition of the bridge. It is essential, as counsel argue, that the injuries should have been shown to have resulted proximately from the defective condition of the bridge. *Harris v. Board, etc.*, 121 Ind. 299.

But the falling of the horse from, and the dragging of the wagon wheels over, the side of the narrow and unguarded bridge, by which the appellee was precipitated to the stream below, and sustained injuries, as alleged, sufficiently connect the injuries to the defects as their immediate cause.

Complaint is made of the action of the trial court in sustaining the appellee's demurrer to the appellant's third paragraph of answer. The answer alleged that the bridge was not over a running stream; that it was constructed by township officers, and was located over a private ditch, and that the proper township officers had sufficient funds to maintain said bridge.

As to the allegations that the bridge was not over a watercourse, and that it was not constructed by the county, they were, at most, but specific denials of the cause of action, and upon the appellant's theory that only such bridges as were built by the county over watercourses were county charges, such facts admissible under the general denial, which was also filed by the appellant. As to the theory of liability by the township, urged in favor of the answer, we have already stated our views. There was, in our opinion, no error in sustaining the demurrer to the answer.

The court denied the appellant's request that the jury be directed to view the locality of the occurrence, and of that action appellant complains. .

The action of the court is not shown to have been in

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abuse of its discretion and is not reversible error. *Board, etc., v. Castetter, supra.*

Objection is made that a number of instructions were asked by the appellant and were refused, and that several erroneous instructions were given. The record nowhere discloses that it contains all of the instructions given by the court, and it is our duty to presume that other instructions were given which covered the correct propositions of the instructions refused. Elliott's App. Proc., section 722; *Grubb v. State*, 117 Ind. 277; *Cooper v. State*, 120 Ind. 377; *City of New Albany v. McCulloch*, 127 Ind. 500.

We have examined the charges given by the court, and find that those given by the court of its own motion and objected to in this court, define a watercourse and a bridge correctly as defined in *Board, etc., v. Bailey, supra*, and in *Board, etc., v. Wagner, supra*.

An objection urged to said charges is that they define an artificial watercourse as well as a natural watercourse, in directing the character of watercourse over which counties may build and are required to maintain bridges.

The statute directing the duty does not limit its discharge to bridges over natural watercourses, and we have no doubt that both natural and artificial watercourses are included. *Board, etc., v. Wagner, supra.*

Other instructions given and complained of can not be considered apart from those which are presumed to have been given, and the only fair test of an instruction is when it is considered in connection with all of the instructions given, and not when detached and isolated. Possibly if a charge were found to be so radically misleading and erroneous as not to be pertinent to any possible view of the case made by the pleadings or the evidence, and one which was so prejudicial that its evil effects could not be said to be withdrawn by any other

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charge, it might be considered, notwithstanding the absence of other charges from the record. It is sufficient, in this case, to say that no such charge is in the record.

The appellant submitted interrogatories to the jury, of which were the following, together with the answers of the jury:

"6. Did the county of Jackson, in the State of Indiana, build or cause to be built the bridge or culvert in controversy? Ans. Yes. It was built by their ministerial agents."

"12. Did the board of commissioners of the county of Jackson, Indiana, ever make any repairs on the bridge or culvert, or in any manner take charge of or assume control or management of the bridge or culvert in controversy? Ans. By their ministerial officers they did."

The appellant moved the court to send the jury back "to further answer" said interrogatories, which motion the court overruled, and the appellant excepted. The argument in support of this exception is that the answers were untrue under the evidence, and that interrogatories should be answered either negatively or affirmatively, or by a statement that the jury could not agree. That answers to interrogatories are not supported by the evidence is no reason for returning them to the jury for further answers, but the fact can be taken advantage of only upon the motion for a new trial and in determining whether the general verdict is supported by the evidence. *Indianapolis, etc., R. R. Co. v. Stout, Admr.*, 53 Ind. 143.

It is not within the province of the trial court to require juries to make answers that are strictly within the evidence, that is a matter within the conscience of the jury. The office of interrogatories is to support the general verdict and when an answer stands in irreconcilable conflict with the general verdict it will not defeat it if

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such answer is not supported by the evidence. If the answer is consistent with the general verdict, it can not overthrow the verdict, because it is not supported by the evidence. The sufficiency of the evidence to support the general verdict is tested, as we have said, upon the motion for a new trial, assigning that fact as a cause and not by motion to require further answer from the jury. Further answers may be required where those returned are uncertain or evasive, but not because they are untrue. The mere suggestion of counsel that answers should be in the negative or affirmative may be thought to present the objection that the answers in question are uncertain or evasive.

The motion is joint as to said two interrogatories and must stand or fall as to both. The sixth interrogatory does not inquire as to the action of the county board but asks as to an act by the county. The answer is not only in the affirmative, but is unnecessarily explicit in stating that the county's act was performed by its ministerial agents, whether the commissioners or other ministerial agents does not appear, nor was that fact elicited by the interrogatory. The twelfth answer is not materially different from the sixth in form or substance, but if uncertain and if it should have been returned to the jury, the joint motion could not have been sustained.

Upon the action of the court in overruling the motion for a new trial, the appellant first insists that it was fatal to the appellee's recovery, that she failed to prove, as a jurisdictional fact, that she had filed her claim for allowance before the appellant prior to filing her complaint in this cause. This question has been decided against the views of the appellant. *Bass Foundry, etc., Works v. Board, etc.*, 115 Ind. 234; *Board, etc., v. Leggett*, 115 Ind. 544; *Board, etc., v. Arnett, supra*.

It is next urged that the evidence established, without

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conflict, that the bridge in question was one whose chord was less than twenty-five feet. From this conclusion it is argued that under section 3282, R. S. 1894, section 2892, R. S. 1881, the bridge was a township and not a county bridge.

We are unable to concur in appellant's construction of that provision of the statute. It expressly provides that "The board of commissioners of such county shall cause all bridges therein to be kept in repair."

It also provides that the board shall cause the township superintendent to place a warning against fast driving "at each end of any bridge in his district whose chord is less than twenty-five feet." The duty of the board as to repairs is not diminished by this provision, nor is any duty enjoined upon the superintendent as to repairs.

The statute in no way defines the size of the bridge which counties shall maintain.

The contention that the evidence establishes the fact that the horse did not fall from the bridge, but that he was driven over the embankment at the end of the bridge can not be passed upon by us. The evidence is in conflict upon that subject, and it is not our duty or privilege to weigh the evidence.

The same may be said with reference to other propositions urged by the appellant, especially as to the character and extent of appellee's injuries, the fact as to whether appellee jumped or was thrown from the wagon, and whether the bridge spanned a watercourse. As to the location of the bridge, whether within the city of Seymour or outside thereof, the question is in more doubt than any of the above questions, as they arise upon the evidence. It is not claimed by any witness that there is more than five feet off the west side of the bridge that is within the corporate limits of said city, while the un-

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contradicted evidence is that it was built by the township and rebuilt by the township. However, it is claimed by the appellant that the city, after the rebuilding of the bridge, paid to the township one-half of the cost thereof.

The only evidence in the record of the location of the corporation line is that shown by a map of an addition to said city extending from said city south to and beyond said bridge, and on the west side thereof. From that map, it appears that the corporation line passes along the west line of the highway, and includes no part of said bridge. While the map appears to have been made by and placed in the record as an exhibit with the evidence of said witness, he does not testify to its correctness, nor is it certified by any officer. It appears in the record without objection or exception. The evidence, as we have stated it, does not present a conflict, since the payment by the city of a part of the cost of building the bridge neither subjects it to city control nor diminishes the interest in or duty over said bridge by the appellant.

Aside from the circumstance of paying a part of said cost by the city, we think the evidence sufficient to establish, *prima facie*, that the bridge was one, though built by the township authorities, over which the appellant had control.

In their answers to interrogatories, the jury find that no part of the bridge was within the city, and if there were conflict in the evidence upon this subject, we could not pass upon such conflict. See cases above cited as to duties of counties in maintaining public bridges.

We are not to be understood as holding that bridges within cities or towns, or those not over watercourses, or those simply forming a part of a public highway, whatever their size or character, are subject to county control

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and as necessarily subjecting counties to liability for injuries from defects. The case presented does not require decision upon any such question.

Objection is made that the court permitted evidence of declarations of pain and suffering by the appellee after the occurrence and up to the time of bringing this action. Such evidence has so frequently been held admissible that it would seem unnecessary to collect the cases or state their reasons. Some of them are *Chicago, etc., R. R. Co. v. Spilker*, 134 Ind. 380; *Rhodes v. State*, 128 Ind. 189; *Board, etc., v. Pearson*, 120 Ind. 426; *Board, etc., v. Leggett, supra*; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544.

We find no error in the record for which reversal can be had, and the judgment of the circuit court is affirmed.

Filed Oct. 16, 1894; petition for a rehearing overruled Dec. 18, 1894.

No. 16,484.

CRAIG ET AL. v. MAJOR, EXECUTOR, ET AL.

JUDGMENT.—*Quieting Title.—Reformation of Decree as Against Subsequent Purchaser.*—A decree quieting title will not be reformed at the suit of a grantee of one who was a party thereto, as against a purchaser for value under the decree, on the ground that the plaintiff's grantor was prevented from defending by information from the attorney for the judgment plaintiff that the land claimed by him was not included in the complaint to quiet title, unless it is shown at least that the land purchased from such judgment plaintiff was purchased with knowledge of the erroneous information inducing the default.

From the Morgan Circuit Court.

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J. H. Jordan, O. Matthews and W. R. Harrison, for appellants.

W. S. Shirley, W. H. H. Miller, F. Winter and J. B. Elam, for appellees.

HACKNEY, J.—This suit was prosecuted in the circuit court for the correction of a decree of said court rendered in the year 1882, in which decree the appellee Major, as executor of the last will of Isabella Craig, secured an adjudication quieting the title of his testator in and to a certain tract of land in Morgan county.

The description of said tract, as contained in said decree, included a narrow strip theretofore held and occupied in complete adverse possession by the grantors of the appellee Sarah M. Sherley, for more than twenty years.

The correction sought was to have said narrow strip omitted from said decree. The complaint alleged that in partition of the lands of William H. Craig, in 1864, the commissioners set off to said Isabella, as widow, a tract lying immediately south of a tract owned by one John Sims; that she went into the possession of said tract and occupied the same until her death in 1882; that by mistake of said commissioners the lands so set off to said widow were so misdescribed as to include none of the tract intended, but to include lands owned by one Mitchell, south of the track intended to be described; that the suit of said Major, executor, was intended to correct the misdescription so made by said commissioners and was not to disturb or in any manner affect the title to the lands so theretofore owned by John Sims; that between the tract so misdescribed and the tract of said Sims a line had been established in the year 1858, and had been maintained without question or disturb-

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ance until in 1887; that in the preparation of the entry of said decree the said Major, executor, and his attorney did not intend to claim or acquire any interest in the lands so occupied and held by said Sims, and that it was by their mistake and inadvertence that the description prepared by them did include the narrow strip aforesaid.

It is alleged further that La Fayette Sims had become the owner of said tract so formerly owned by John Sims, and was made a defendant to said suit by Major, executor, but that he suffered default in said suit from the fact that Major's attorney therein had informed him that the purpose of said suit was, as we have stated, the alleged intention of said Major, and was not to disturb the lines or affect the title of said Sims in any manner, which information said Sims trusted in suffering such default. It is also alleged that said Major, executor, after the entry of said decree, sold said lands of the testator to Harvey Satterwhite, appellant herein, and in 1886 made to him a deed for said lands, erroneously describing them as they were described in said decree; that none of the parties knew of said mistake until in 1887, when Satterwhite procured a survey of said lands, discovered that as described they included the narrow strip then held adversely by Mrs. Sherley, and then, for the first time, asserted claim thereto, after having purchased with knowledge of the location of said division line and having acquiesced therein from in 1883, when he purchased from said executor.

The appellant Satterwhite's fourth paragraph of answer alleged that the decree was in compliance with the complaint in said suit and was duly rendered and entered of record, and remained in full force and unquestioned by Mrs. Sherley or her grantor until the 2d day of February, 1891, when this proceeding was instituted; that he purchased from said executor, relying on said

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record as fixing the boundaries to said lands and quieting the title thereto, and after inspecting said decree, and that he paid for said lands the sum of five thousand three hundred dollars; that he purchased after due notice in a weekly newspaper of general circulation in the neighborhood of La Fayette Sims, Mrs. Sherley's grantor; that in the petition for the sale, in the notice of sale and in all proceedings relating to said sale, said lands were described as in said decree, and were regarded as correctly described; that in 1887, upon notice to Mrs. Sherley, he procured a survey of said lands for the purpose of marking the same, which survey was in all respects according to said decree, as Mrs. Sherley then knew; that she appealed from said survey, a trial was had in the circuit court, wherein said decree was introduced in evidence; that from the decision of the circuit court an appeal was prosecuted in this court, resulting, as shown in *Satterwhite v. Sherley*, 127 Ind. 59, in a decision that the parties were bound by said decree as to the description of said lands, of which decision Mrs. Sherley well knew.

It is further alleged that when Mrs. Sherley purchased her lands, in 1886, said decree was in full force, and that she and her grantor had notice thereof; that the record title of Sims and of Sherley has been in accordance with said decree as to the description of said lands.

Upon these facts it is prayed that Mrs. Sherley be held estopped to question said decree.

The court overruled appellant Satterwhite's demurrer to the complaint and sustained the appellee Sherley's demurrer to said paragraph of answer, and these are the only rulings urged in argument as having been erroneous. It will thus be seen that the questions at issue affect the appellant Satterwhite and the appellee Sherley.

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The decree again in question was held, in *Satterwhite v. Sherley, supra*, to have been valid and binding against Sims and his grantee, Mrs. Sherley, as quieting the title to the strip of land now in question, not only in Satterwhite's grantor, but to the benefit of Satterwhite as a subsequent purchaser. As to the character and effect of the decree, as it was entered, the parties are precluded. The character thus declared, it is here asked, shall be changed by the introduction of no new element arising upon the pleadings, no error of the court, no fraud of the parties to the suit, but by reason of a misconstruction, by the plaintiff and his counsel in that suit, of the scope of the description contained in the complaint. The effect of the allegation as to the information given the defendant Sims was that the lands claimed in the complaint were not so described as to include any belonging to him. While doubting the right of Sims to rely upon the information so given, and to permit a decree by default without further inquiry or an examination which would have disclosed the error to him as readily as to the attorney, we find it unnecessary to decide the question. See *Rosa v. Prather*, 103 Ind. 191; *Snipes v. Jones*, 59 Ind. 251.

But, for the purposes of this case, it may be conceded that Sims might excuse his default by relying upon the statement of the attorney of the plaintiff, and two very important questions arise in considering the sufficiency of the complaint, namely:

Can that excuse be asserted to deprive the appellant Satterwhite of interests acquired under the decree?

Can the appellee Sarah M. Sherley, a purchaser from Sims, assert that excuse in her own behalf?

The complaint alleges that Satterwhite purchased with knowledge that Sims was and had been in actual possession of the lands north of the originally established

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line, and it is upon this allegation alone that it is claimed he was not an innocent purchaser. It must be observed that it is not alleged that he purchased with knowledge of the principal fact now asserted for the modification of the decree; the erroneous information given to Sims, and inducing his default. Without this knowledge, there could be no reasonable objection to his relying with confidence upon the decree which defined the quantity and location of the lands he purchased. The knowledge charged to him was of facts which the decree had held for naught. The decree imparted to him, with all of the force and solemnity of which an adjudication of a court of record is capable, the information that, regardless of former liens and former adverse possession, Sims was precluded to claim title to any part of the lands included within its terms.

We suppose it can not be controverted that but for the allegation that Sims was misinformed as to the extent of the demand in the complaint of Major, as executor, there could have been no inquiry into the questions of adverse possession, former location of lines and acquiescence in title and the lines of Sims. In other words, this allegation is the wedge which opened the case to additional inquiry, and but for it the decree would have foreclosed all further inquiry. Now, without knowledge of this element so essential to the overthrow of the decree, it seems to be beyond question that Satterwhite could not be held a purchaser with knowledge affecting his title.

It has been held by a long and unbroken line of decisions in this State that equity will grant no relief from the mistakes or secret claims of one against another who has innocently invested his money in acquiring equities equal or superior to those sought to be relieved against. *Flanders v. O'Brien*, 46 Ind. 284; *Barnaby v. Parker*, 53 Ind. 271; *Busenbarke, Err., v. Ramey*, 53 Ind. 499;

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Wainwright, Admr., v. Flanders, 64 Ind. 306; *Tuttle v. Churchman*, 74 Ind. 311; *Rooker v. Rooker, Guar.*, 75 Ind. 571; *Milner v. Hyland*, 77 Ind. 458; *Huffman v. Copeland*, 86 Ind. 224; *Taylor v. Morgan*, 86 Ind. 295; *Gray v. Robinson*, 90 Ind. 527; *Ritter v. Cost*, 99 Ind. 80; *Indianapolis, etc., R. W. Co. v. Bird*, 116 Ind. 217.

In *Freeman on Judgments*, section 74, it is said "amendments of the entries of judgments and of decrees

* * will only be permitted in furtherance of justice, and on such terms as shall protect the interests of third parties acquired for a valuable consideration without notice." This rule is quoted and applied in *Gray v. Robinson, supra*, and applies here with equal force.

In *Flanders v. O'Brien, supra*, is this statement of the rule, and the reason for it: "Such purchaser * * has acted upon the apparent facts of the case, as the parties have allowed them to exist. It is their fault if the papers do not speak the truth, and it may be unjust that their mistakes should be cured to his injury, who has been misled by their failure to attend carefully to their own business."

When the complaint alleged the purchase by Satterwhite, it was incumbent upon the pleading to further show that the correction sought was one which equity would correct as against such purchaser. This could not be done except by alleging facts showing him to have purchased in bad faith, or with notice of the equity asserted or without consideration.

The principles here announced, and the authorities cited, apply to the answer in question with even greater force, and establish its sufficiency, since it is therein affirmatively alleged that Satterwhite was a good faith purchaser, for a valuable consideration, with knowledge of and reliance upon the decree sought to be modified. As the modification prayed would deprive him of a part

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of the land so purchased, it would not only be unjust to him but would deny to him an equity which would be granted to Mrs. Sherley, who purchased with constructive notice of every fact which she now asserts against him.

We conclude, therefore, that the complaint was insufficient, and that the answer was sufficient. It has also been held that the grantee who purchases with constructive notice of a judgment lien can not defeat the lien of such judgment by asserting that it had been procured by the fraud of the judgment creditor, and that the remedy of such grantee was upon the covenants of his deed. See *Hogg v. Link*, 90 Ind. 346.

Finding it unnecessary to apply the rule so adopted, we but suggest it for consideration upon a possible reformation of the issues in this case.

For the errors found, the judgment of the circuit court is reversed with instructions to sustain the appellant's demurrer to the appellees' complaint.

Filed Jan. 2, 1894; petition for a rehearing overruled Dec. 13, 1894.

No. 17,145.

BADGER v. MERRY ET AL.

COUNTY COMMISSIONERS.—*Commissioners' Court.*—*Have Only Statutory Power.*—*Void Act.*—*Attempt to Change or Vacate Judgment.*—The board of county commissioners has no power other than that conferred upon them by statute. Such board has no statutory power to change, vacate, or disregard its order or judgment after it has been made and recorded, and an act of the board in attempting to do so is void; the only remedy of an aggrieved party, in such case, is by appeal.

SAME.—*Appeal.*—*Dismissal of.*—*Harmless Error.*—*Void Orders.*—Where

139	631
159	662
139	631
164	114
139	631
165	24

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an appeal is taken from the order of the board setting aside all its other orders made after the final order or judgment has been made and entered, a dismissal of the appeal can not harm appellant, for the appellant could have no other purpose in the appeal than to reinstate the void proceedings had since the rendition of the final judgment.

From the Steuben Circuit Court.

J. A. Woodhull and W. M. Brown, for appellant.

E. A. Bratton, for appellees.

MCCABE, J.—The appellees filed a petition before the board of commissioners of Steuben county, praying for the vacation of a highway and the location of a highway within said county. The appellant was named in the petition as one among others whose lands would be affected by the proposed location of such highway.

At the September term of said board for 1892 it found that the requisite number of persons had signed the petition, and the existence of the other jurisdictional facts, and appointed three persons viewers to view said proposed highway and vacation:

At the following December term of said board said viewers reported to said board that the location of the proposed highway would be of public utility, and that the proposed vacation of such highway will injure the public and do not recommend said road to be vacated. No remonstrances being filed, the board approved the report and entered a final order or judgment that said highway be, and the same is, hereby established, and that it be opened to the width of forty feet, and the auditor was ordered to notify the proper trustee.

Three days afterwards, and on the 7th day of the December term of said board for 1892, the appellant, on affidavit, moved to have the final order establishing the highway set aside. The ground stated in the affidavit to set aside the judgment was that the appellant's lands

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were affected by the order, and other facts tending to show as an excuse for failure to appear sooner and object, surprise and excusable neglect. This motion was sustained, the final order or judgment of the board establishing the highway was set aside, and the appellant and many others thereupon filed remonstrances on the ground of want of public utility of the proposed highway and for damages.

On these remonstrances reviewers were appointed by the board, and said reviewers reported to said board, at its March term, 1893, that the proposed highway would not be of public utility. Thereupon the appellant appeared before the board and moved the court to dismiss the application and proceedings because, 1, the petition asks for the establishment of one highway and the vacation of another, and want of jurisdiction; 2, because the reports of viewers and reviewers show that the proposed vacation and establishment are not of public utility. And thereupon appellees, the petitioners, appeared and moved the commissioners' court to set aside and dismiss all papers, pleadings, remonstrances, affidavits and reports filed in said cause, and to vacate, set aside and annul all the orders made and proceedings had since the rendition of the judgment and order of the board of commissioners of said county locating and establishing said public highway, on the ground that said board of commissioners had no power or authority to set aside and vacate the judgment and order locating and establishing said public highway, and for the further reason that the petitioners, the present appellees, had no notice of such proceedings.

The motion of appellant to dismiss was overruled, and the motion of appellees to set aside, etc., was sustained, and the board set aside all its proceedings which occurred subsequently to the final order or judgment of the board

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establishing the highway. This order was entered on the 20th day of March, 1893, at the March term of said board for that year, whereupon the appellant, Badger, prayed an appeal to the circuit court from that order of the board and filed his bond for an appeal. In the circuit court the appellant renewed his motion to dismiss the cause, and the appellees moved to dismiss the appeal. The former motion was overruled and the latter was sustained by the circuit court. These rulings are both assigned as error. Appellant also assigns as error that the petition does not state facts sufficient.

Appellees contend that we can not consider the question of the sufficiency of the petition, for the reason that it is not before us. Whether it is before us depends on the question whether the board had any power to set aside its final order establishing the highway after it had been made and entered of record.

It was held by this court in *Doctor v. Hartman*, 74 Ind. 221, that the commissioners' court has no power to set aside a judgment it had rendered, either during the term at which it was rendered or afterwards. Following and citing that case this court, in *Kyle v. Board, etc.*, 94 Ind. 115 (118), said: "A judgment or order duly made, directing the establishment of a new and the vacation of an old highway, is not one that the board of commissioners can set aside or amend at their pleasure. When the order or judgment has been made and recorded, the authority of the commissioners is exhausted, and they have no right to change or vacate it, and of course no right to disregard * * it."

The only remedy in such a case by an aggrieved party is by an appeal. *Doctor v. Hartman, supra.*

In *Gavin v. Board, etc.*, 104 Ind. 201, this court said: "Where a board makes a final order it can not at pleasure take the matter up and make other orders."

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To the same effect are *City of Madison v. Smith*, 83 Ind. 502; *Weir v. State, ex rel.*, 96 Ind. 311, and *Board, etc., v. Logansport, etc., G. R. Co.*, 88 Ind. 199.

Therefore the act of the board in attempting to set aside its final order and judgment establishing the highway was ineffectual and void for want of power to do such act. It may have been thoroughly convinced that its final judgment was wrong, yet it had no power either to grant a new trial or set aside its judgment on the motion of an aggrieved party, or otherwise, simply because the board of commissioners has no other power than statutory power, and no such power has been conferred by statute on boards of commissioners. See authorities above cited.

If a party is aggrieved by a final judgment or order of a board of commissioners, if the judgment or final order is of a judicial character, he is provided with a remedy by appeal, which must be taken within thirty days. Burns R. S. 1894, sections 7859, 7860; R. S. 1881, sections 5772, 5773.

The final order in question was judicial in its character. Therefore, the petition having been merged in the final judgment establishing the highway, and the order attempting to set it aside being ineffectual and void, the petition is not before us, and for that reason we do not inquire into its sufficiency.

No appeal was taken from said final judgment or order, and at the time the appeal was taken in this case from the decision of the board of commissioners none could have been taken from such final order, because more than thirty days had elapsed from the making of the order to the taking of the appeal. So that the original proceeding for the location of a highway was not brought into the circuit court by the appeal. The appeal was taken from the order of the board setting aside

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all their orders made after the final order or judgment had been made and entered. Therefore, there was no error in overruling the motion in the circuit court to dismiss the action.

It remains to determine whether the circuit court erred in dismissing the appeal. We have already said that the order of the board of commissioners attempting to set aside their final order or judgment establishing the highway was void. Yet, it is unnecessary for us to decide whether the circuit court erred in dismissing the appeal, as an abstract proposition of law, because the appellant assigning that ruling as error must not only show that it was error, but that it was an error that harmed him, before he can have a reversal. The statute forbids the reversal of a judgment for errors which do not prejudice the substantial rights of the appellant. Burns R. S. 1894, section 1964; R. S. 1881, section 1891; Elliott App. Proced., section 292, and authorities there cited.

Had the circuit court overruled the motion to dismiss the appeal, and adjudicated the cause, it follows, from what we have said, that it must have confirmed the action of the board of commissioners in setting aside the void order, which, by his appeal, he was seeking to reinstate. Therefore, the dismissal of his appeal by the circuit court did not prejudice his substantial rights.

The action of the circuit court, if error at all, was harmless.

The judgment is affirmed.

Filed Dec. 19, 1894.

Welch v. Fisk, Auditor.

No. 16,889.

139	637
145	158

WELCH v. FISK, AUDITOR.

MARRIED WOMAN.—*School Fund Mortgage on Her Separate Property to Secure Husband's Individual Debt.—Void.—Sale May be Enjoined.*—Where it does not appear that a married woman made the statutory statement to obtain a school fund loan, nor that she obtained the loan, but that it was made directly to the husband on his individual note, the only act of the wife being to unite with her husband in the execution of the mortgage on land owned by the husband, and also upon land owned by her in her own right, to secure the note, the mortgage as to the wife's land is void, and its sale may be enjoined.

From the Ohio Circuit Court.

*G. E. Downey and F. M. Downey, for appellant.**J. B. Coles and G. B. Hall, for appellee.*

HOWARD, J.—The sustaining of a demurrer to the complaint of appellant is the only error alleged in this case.

From the complaint it appears that on the 14th day of June, 1886, one Henry Welch, husband of appellant, executed his note, payable to the State of Indiana, for the use of the school fund, in the sum of four hundred and five dollars; that on said day, to secure said note, said Henry Welch and the appellant, his wife, executed a mortgage on certain land owned by said Henry Welch, and also upon the land in controversy owned by appellant in her own right, that the debt so secured was not the debt of appellant but was that of her said husband; that the appellee had given notice of sale and was about to sell the land so mortgaged in payment of said debt, and threatened to sell appellant's said land, together with her said husband's, asking that appellee be restrained from selling appellant's said land.

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In *Crooks, Aud., v. Kennett*, 111 Ind. 347, it was said that it is settled as the law of this State, under the statute in force since 1881, that a mortgage executed by a married woman upon her separate real estate to secure the debt of her husband or others is invalid, and can not be enforced.

In *State, ex rel., v. Kennett*, 114 Ind. 160, a husband and wife owning land by entireties, executed a mortgage upon the land to the school fund to secure the husband's debt. This court held that the mortgage was void.

These authorities would seem to be decisive of this case in favor of appellant.

Counsel for appellee say that the question for decision is: "Can a married woman, joining with her husband in the execution of a school fund mortgage in the form prescribed by the statute, and obtaining a loan of public funds, be heard to say that the mortgage is void as to her?"

If that were indeed the question, the answer must be in the negative. *Snodgrass v. Morris, Aud.*, 123 Ind. 425; *Davee v. State, ex rel.*, 7 Ind. App. 71; *Lloyd v. State, ex rel.*, 134 Ind. 506; *State, ex rel., v. Frazier*, 134 Ind. 648.

But, in all these cases, the first two being relied upon by appellee, the wife was herself the borrower, either by herself or with her husband.

In the first case cited, *Snodgrass v. Morris, Aud., supra*, the court says: "It is, at least, very doubtful whether a married woman who makes the statement the statute requires in order to obtain a loan from the school fund can defeat the mortgage she joins in executing."

In the case before us it does not appear that the appellant made the statutory statement; neither does it appear that she made the loan. The loan was made directly to her husband, on his individual note. Her

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only act, as appears, was in uniting with her husband in the execution of the mortgage, as was necessary to make his mortgage good on his own land.

In the next case, *Davee v. State, ex rel., supra*, it is said: "All the statutory requirements to procure the loan were complied with. She executed her note for the sum of \$300, and she and her husband duly executed a mortgage on her real estate to secure the loan. She made the statutory oath that she was the legal owner of the property mortgaged."

In that case, also, the loan was made directly to the wife on her own note. There is no doubt that she might thus borrow money from the school fund, the same as any other person. The case at bar is different. Here the wife did not borrow the money. The mortgage was upon her husband's land, with which one lot of her own, for some reason not shown in the record, was included. Her only apparent connection with the transaction is that she joined with her husband in the execution of the mortgage.

The case of *Lloyd v. State, ex rel., supra*, is based upon the same transaction as that of *Davee v. State, ex rel., supra*, and in principle is identical with it. The court, in *Lloyd v. State, ex rel., supra*, said: "The record shows the loan to * * be a loan made to the appellant. The papers are all executed by her individually, except her husband joins in the execution of the mortgage. The note and the sworn statement as to title are signed by the appellant alone."

In the last of the cases cited, *State, ex rel., v. Frazier, supra*, the decision made was that where a married woman makes application in her own name for a loan from the school fund, and, joined by her husband, gives the statutory note and mortgage on her separate estate to secure the loan, and is paid the proceeds of the loan, she can not,

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in an action by the State to foreclose the mortgage, set up as a defense that she signed the note and mortgage merely as surety for her husband.

All of these cases decide the law correctly, as we think, but they do not govern the case now before us for consideration. It does not appear that the appellant signed the statement as to title; she did not sign the note to the school fund; she did not receive the money borrowed; the debt was solely that of her husband. It would seem that if there can be any case in which a married woman may plead the statute of suretyship this must be one.

One ground stated for the demurrer is that there is a defect of parties; that the State is the real party in interest, and should have been made a party defendant. The State can not be made a party against her will. The auditor here represents the interests of the State. It is alleged that the mortgage, as to appellant, is void, and that the auditor is about to sell her land under the void mortgage. If this be true, certainly the auditor may be enjoined from doing the wrong contemplated. It is not proposed to take a judgment against the State but to enjoin the auditor from acting under a mortgage which is void according to the laws of the State.

The judgment is reversed, with directions to overrule the demurrer to the complaint, and for further proceedings.

Filed Oct. 18, 1894; petition for rehearing overruled Dec. 20, 1894.

Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Stephenson.

No. 16,825.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. STEPHENSON.

NEGLIGENCE.—*Licensee*.—*Trespasser*.—*Duty to*.—*Railroad*.—*Complaint*, *Theory of*.—*Personal Injury*.—Where the complaint in an action against a railroad company, for personal injury, was drawn upon the theory of negligence by the railroad company causing the injury to the plaintiff, a servant of C., engaged at the time with C. in loading hogs in a car furnished by the railroad company for C. upon his request, while the answers to interrogatories establish that, without notice to the railroad company of an intention to load the hogs, such servant and one of his employers pushed a car, not furnished for C., up to the chute and loaded the same,—the plaintiff, if not a trespasser, was a mere licensee, to whom the defendant owed no protection from negligence.

From the Boone Circuit Court.

J. T. Dye, B. K. Elliott, W. F. Elliott, A. Baker and E. Daniels, for appellant.

H. C. Wills and T. J. Terhune, for appellee.

HACKNEY, C. J.—This suit was by the appellee to recover damages for personal injuries alleged to have resulted from the negligence of the appellant. The complaint alleged that the appellee, an employe of Clay & Cook, live stock shippers, was engaged in loading a car supplied by the appellant; that the chute from appellant's stock yards, through which appellee had driven hogs into said car, was connected with the car by a "drop," or shifting bridge; that while the appellee was in the act of removing said "drop" in preparing to close the car door, and while inside of said car, the appellant's employes, knowing of the presence of said car, and that the appellee was so engaged, caused three empty cars to be driven upon the switch and in violent contact with

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said car, catching the appellee's foot between said drop and the car door post and inflicting the injury complained of.

The theory of the action is that the injury was the result of negligence and not of willfulness. Upon this theory it is well settled that it must appear that the alleged negligent party owed to the injured party some duty to protect him from such negligence. This theory and rule were recognized by the appellee in the essential allegation in his complaint, that he was at the time a servant of Clay & Cook, and engaged for them in loading hogs "into a car furnished by the said defendant to said Clay & Cook on said side track at their request and for that purpose."

The general verdict is necessarily upon the theory thus pleaded, and must stand as against the answers to special interrogatories, unless it is found that such answers are in irreconcilable conflict with it. The appellant insists that such conflict exists. It is specially found that the hogs were loaded and the injury sustained on the afternoon of February 24, 1891, and in answer to interrogatories numbered 23, 25, 26, 27 and 28 it is found that, without notice to the appellant of an intention to load said hogs, the appellee and one of his employers went to the stock yards of the appellant, where they found upon the side track several stock cars east of the chute; that they pushed one of said cars up to said chute and loaded the same without the knowledge of the company of the intention to so move said car and to load it with said hogs, and said company did not "know of the loading of said car while the loading was in progress."

It thus appears that the theory of the complaint is untrue, and that the general verdict is squarely denied upon the essential element of the case, viz., that the appellee

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was in the car by authority from the company, and was in a position in which the appellant owed him a duty to protect him from its negligence. If the appellee, without notice to or the knowledge of the company, took possession of one of the cars, moved it to the chute and loaded it with hogs, he was, at best, a mere licensee if not a trespasser. In either case the company owed him no protection from its mere negligence. *Parker, Admr., v. Pennsylvania Co.*, 134 Ind. 673; *Faris v. Hoberg*, 134 Ind. 269; *Louisville, etc., R. W. Co. v. Bryan*, 107 Ind. 51; *Louisville, etc., R. W. Co. v. Ader*, 110 Ind. 376; *Chicago, etc., R. R. Co. v. Hedges, Admx.*, 105 Ind. 398.

The train from which the three cars, as alleged, were shunted into the switch was not the train upon which it was expected to ship said hogs, but was in advance of such train four or five hours.

There are answers to interrogatories, finding that the conductor, engineer, and fireman of the train, so placing said cars upon the switch, knew at the time they did so that some one was in said car so standing at the chute, and that it had cattle or hogs in it. This knowledge is not, possibly, the equivalent of authority to the appellee from the company, and it could at most be sufficient to protect the appellee from willful injury.

The complaint and the general verdict not having been upon the theory of willfulness, as we have said, this knowledge gives no support to them, and does not contradict the other answers to which we have referred.

There are numerous other questions presented by the record and the briefs of appellant's counsel, but we deem it unnecessary to decide them. The appellee has abandoned his case in this court, and has left us to search through a voluminous record of several hundred pages to consider and meet the argument of the appellant's learned counsel, and that without brief or argument in

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support of the verdict and judgment for four thousand dollars in his favor.

We have examined the evidence and find that it supports the special finding of the jury, that the car in which the appellee was injured was not ordered by nor furnished for Clay & Cook, but that it was taken by them, moved to the chute and loaded without the knowledge of the company. It was, therefore, not only the duty of the court to render judgment for the appellant upon said special answers, but such judgment would have been just upon the evidence under the rule we have stated.

The judgment is reversed, with instructions to the circuit court to sustain the appellant's motion for judgment upon the answers of the jury to special interrogatories, notwithstanding the general verdict.

Filed June 6, 1894; petition for a rehearing overruled Dec. 20, 1894.

No. 16,965.

METTART ET AL. v. ALLEN.

TITLE.—Notice.—When One is Put on Inquiry.—Deeds Referred to.—Search.—A person is regarded as notified of whatever appears on the instruments which constitute his chain of title, and whatever is sufficient to put him on inquiry is sufficient to charge him with whatever an ordinarily diligent search would have disclosed; and all deeds referred to as being in any way connected with the title, as well as those upon which the title is based, must be examined as to any facts they may contain, at the purchaser's peril.

SAME.—Failure to Search Records.—Equitable Relief.—Where it was a person's duty to search the records, which he did not do, he can not invoke the aid of a court of equity to relieve himself from the consequences of his own want of care.

SAME.—Recitals in Mortgages, When Sufficient to Put Purchaser on In-

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quity.—Notice.—Incumbrances.—That certain mortgages contain recitals of facts which made it a purchaser's duty to make an examination of the records to ascertain if there were any existing incumbrances upon the premises conveyed, see opinion.

DESCRIPTION.—Real Estate.—A description of real estate that may be rendered certain by averment is not void for uncertainty.

From the Wayne Circuit Court.

J. Brown, L. A. Brown and L. E. Kepler, for appellants.

B. F. Mason and T. J. Study, for appellee.

DAILEY, J.—This action was brought by the appellant, Mettart, against the appellee, Mary Allen, to quiet the title of said Mettart to certain real estate described in his complaint. The appellee filed a cross-complaint in the case, making the appellant George T. Kepler a party thereto, for the reason that he held a mortgage on said land, and in her cross-complaint set up a mortgage covering a part of the premises claimed by the appellant, executed to her deceased husband, John Allen, on the 10th day of January, 1885, to secure the payment of a note calling for the sum of four hundred dollars, which note and mortgage the executor of the will of said John Allen had assigned to the appellee, Mary Allen, and which mortgage she claimed was a first lien on the land.

The court made a special finding of facts, with conclusions of law thereon, and found that appellee's said mortgage was the first lien on a part of the land, and rendered a decree foreclosing said mortgage and ordering the sale of that portion of the real estate covered thereby. The evidence is not in the record, and the facts must be presumed to have been correctly found by the trial court. The result, therefore, of the case in this court depends upon the correctness of the conclusions of law drawn upon the facts found by that court. From these findings it appears that the southwest quarter of

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section 7, in township 17, range 13 east, in Wayne county, Indiana, contains only 114.24 acres, which quarter was purchased by William Brown, of the United States, February 27, 1836, and the certificate therefor was duly recorded in the recorder's office of said county; that on the 13th day of October, 1842, said Brown sold, and by deed conveyed, to Philander Fowler 35 acres off the north end of said quarter, which deed was duly recorded in the recorder's office of said county on October 24, 1842, leaving unconveyed and still owned by said Brown 79.24 acres of said quarter; that on the 14th day of February, 1850, the 35 acres were conveyed by John M. Knight, commissioner, to James Walker, the deed therefor being duly recorded in said recorder's office on December 18, 1850; that on the 16th day of August, 1847, said William Brown sold, and by deed conveyed, said quarter section to James Brown, except said 35 acres, which, said deed recited, had been previously sold to James Walker, and the deed from William to James Brown was duly recorded in the recorder's office on the date of its execution; that said James Brown, on the 10th day of November, 1853, sold and conveyed to James Walker 39.62 acres off the north side of said 79.24 acres which he purchased of William Brown, and which was described in the deed as the north half of the residue of said quarter. On the 6th day of October, 1854, said Walker sold and by deed conveyed to Elisha Brown 39.62 acres off the south side of said quarter, the premises being described as "the south half of the residue of said quarter," and this deed was duly recorded in said recorder's office January 18, 1855, and upon the execution of said deed to said Elisha Brown he took possession of the tract therein described and held the same until October 1, 1881, when he sold and conveyed it by deed to Catharine Morrical by the description of the *south*

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half of the residue of said quarter, which deed was duly recorded in said recorder's office on March 4, 1882, and upon the execution thereof the grantee took possession of the premises and kept and held the same until the 4th day of December, 1882; that on said day the grantees sold and by deed conveyed said tract to Sarah Fouts by the description of the *south half of the residue of said quarter*, which deed was duly recorded in said recorder's office on the 16th day of January, 1885, and upon the execution thereof to said Fouts she took possession of said tract and held the same until the 19th day of January, 1885, except 20 acres off the west end thereof, which she sold to the appellant Mettart, and Samuel and David Fouts; that on the 19th day of January, 1885, said Sarah Fouts sold and conveyed said tract of 39.62 acres, except 20 acres off the west end thereof, to Martin Worl, by the description of the *south half of the residue of said quarter*, which deed was duly recorded in said recorder's office on the 10th day of November, 1885, and upon the execution of said deed to him he took possession and kept the same until the 25th day of January, 1887; that on the 10th day of January, 1885, and while said Worl owned and was in possession of said 39.62 acre tract, except said 20 acres off the west end thereof, he executed the mortgage thereon to said John Allen, now held by the appellee, Mary Allen, to secure the payment of said note of \$400 which she also holds; that said mortgage was duly recorded in the recorder's office of said county on the 26th day of January, 1885, and in which said land was described as being the *south half of the residue of said quarter*, except 20 acres off the west end thereof; that on the 25th day of January, 1887, said Worl sold and conveyed said 39.62 acres, except said 20 acres off the west end thereof, to Susannah Baker, which were described as being 33 acres off the east end of the south half of said

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quarter, and as being the same land heretofore conveyed by Catharine Morrical to Sarah Fouts, and by her conveyed to Martin Worl, January 19, 1885; that the deed to said Baker was duly recorded in the recorder's office of said county on January 27, 1887, and she took possession of said real estate at the time of the execution of the deed, and held the same until January 25, 1887, when she sold and conveyed the same to Jacob L. Baker, by the same description by which it was conveyed to her, which land said grantee held until January 27, 1887, when he sold and transferred it by deed, by the same description, to appellant Mettart; that when said Sarah Fouts conveyed said 20 acres off the west end of said 39.62 acres off the south side of said quarter to the appellant Mettart and Samuel and David Fouts, on February 7, 1884, it was described in the deed to them as 20 acres off the west end of the *south half of the residue of said quarter*, which deed was duly recorded in said recorder's office on February 7, 1884, and upon the execution of said deed the grantees took possession of said 20 acres. And, on the 16th day of July, 1888, the appellant Mettart sold and conveyed his interest therein to Samuel and David Fouts by the same description; that on the 10th day of November, 1853, said James Brown sold and conveyed to said James Walker the *north half* of said 79.24 acres by the description of the *north half of the residue of said quarter*, which deed was duly recorded in said recorder's office on the 22d day of February, 1854.

The court finds that the said 39.62 acres off the south side of said quarter, from October 6, 1854, to January 19, 1885, inclusive, was known and designated and described in all the deeds of conveyance thereof, being six in number, as the *south half of the residue of said quarter*, all of which were duly recorded in the recorder's office of

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said county, and that when the appellant Mettart purchased the land described in his complaint from Jacob L. Baker, on January 27, 1887, he knew the same had been previously possessed and owned by Elisha Brown, Catharine Morrical, Sarah Fouts, Martin Worl, Susannah Baker and Jacob L. Baker, and that it was *embraced in and constituted a part of what was known as the south half of the residue of said quarter*, and that said 39.62 acres off the south side of said quarter constituted what was known as *the south half of the residue of said quarter*.

The finding of the court thus shows that when appellant Mettart purchased the land described in the complaint, he not only knew the tract known as the *south half of the residue of said quarter*, but knew the land he was buying was *embraced within and constituted a part of that tract*, and knew the various persons who had previously owned the same, one of whom was Worl, and had himself but recently bought, occupied, and conveyed away a portion thereof, by the description of the *south half of the residue of said quarter*.

It will be seen, from the finding of facts, that in all the deeds for this 39.62 acres, including the one to Elisha Brown, and from him down to and including the one to Martin Worl, this tract is described as the *south half of the residue of said quarter*, and that in the deeds from said Worl to said Susannah Baker, and from her to Jacob L. Baker, and from him to appellant, the land is differently described, to wit, as the 33 acres off the east end or side of the south half of said quarter, but in the deed of said Worl to Susannah Baker, which constitutes a part of appellants' chain of title, it is also described or referred to as being the *same land* previously conveyed by Catharine Morrical to Sarah Fouts, and by the latter to Martin Worl, by deed of January 19, 1885.

The appellant Mettart is chargeable with the recitals

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in said deed of Martin Worl, an examination of which would have disclosed to him that this land had been previously owned by said Worl, Catharine Morrical and Sarah Fouts, and that it was described differently in their deeds therefor, from the description in the deeds from Worl to Susannah Baker, and the one from the latter to Jacob L. Baker, appellants' grantor, and was known as the *south half of the residue of said quarter section* in said conveyances.

In addition to this, the court finds that Mettart had actual knowledge of all these facts, aside from that with which he is chargeable from the recital in Worl's deed.

It is also clear that if Mettart had examined the records of these conveyances, he would have seen that while Worl owned this land he executed the mortgage thereon now held by the appellee, by the same description by which it had been conveyed to him, and by which it had been known, conveyed and transferred since 1854, being the same designation by which he knew said 39.62 acre tract had been known, and which the court found embraced the portion he bought of Jacob L. Baker. But the court found that said Mettart made no examination of the mortgage records of said county to ascertain if Worl had executed any mortgage thereon, and that he had constructive notice thereof when he purchased the land described in the complaint.

The law is well settled that a man is regarded as notified of whatever appears on the instruments which constitute his chain of title, and whatever is sufficient to put him on inquiry is sufficient to charge him with whatever an ordinarily diligent search would have disclosed. And that all deeds referred to as being in any way connected with the title, as well as those upon which the title is based, must be examined as to any facts they

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may contain, at the purchaser's peril. Martindale Conv., sections 74 and 277.

It having been the duty of the appellant Mettart to search the records, which he did not do, he can not invoke the aid of a court of equity to relieve himself from the consequences of his own want of ordinary care, and the same reasoning applies to the mortgages held by the appellant Kepler.

The court found that on the 25th day of January, 1887, said Susannah Baker, while the owner of the land, executed a mortgage to said Worl thereon, to secure the payment of four promissory notes calling for \$450, payable in one, two, three, and four years, the land being described as 33 acres off the east side of the south half of said quarter, which notes and mortgage Worl assigned to said Kepler; that on the 29th day of August, 1887, said Jacob L. Baker executed a mortgage on said land to said Kepler, to secure the payment of a note for \$100, and in the mortgage the land was described as above, with the further description, "and being the same land conveyed by Catharine Morrical to Sarah Fouts, and by her to Martin Worl, and by the latter to Susannah Baker, and by the latter to Jacob L. Baker.

And that, on the 15th day of September, 1888, said Jacob L. Baker executed another mortgage on said land to said Kepler, to secure the payment of a note for \$600, in which said land was described as in said other mortgage executed by said Jacob to said Kepler, and said note has been paid, except the sum of \$50. It thus seems that the recitals in the mortgages apprised him of facts which made it his duty to make an examination of the records to ascertain if there were any existing incumbrances upon the premises so conveyed.

The court found that when the mortgage of Susannah Baker to Worl was executed to secure the notes amount-

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ing to \$450, which said Worl assigned to Kepler, and when she bought the land of Kepler she knew of the existence of the mortgage, now held by the appellee, and that Kepler made no examination of the mortgage records, to ascertain if there were any prior mortgages on the land. The court does not find that the notes assigned to and held by Kepler were payable in any existing bank of this State, so as to give them the sanctity of commercial paper, and hence he holds them subject to the same defenses that they would be exposed to in the hands of any previous holder.

We do not think the Allen mortgage is absolutely void, by reason of the description, as asserted by the learned counsel for the appellee. A description of real estate that may be rendered certain by averment is not void for uncertainty. *Pence v. Armstrong*, 95 Ind. 191.

It has been held that the description of a tract of land by the name which it has acquired by reputation is sufficient. *Huddleson v. Reynold's Lessee*, 8 Gill & Miller (Md.), 332; 50 Am. Dec. 702.

So a tract of land that has a well known name may be described by that name. *Haley v. Amestoy*, 44 Cal. 132; *Stanley v. Green*, 12 Cal. 148.

It is also a doctrine of the courts that possession may render certain what would otherwise be an uncertain description. *Richards v. Snider*, 11 Ore. 197.

In our opinion the description of the real estate in question is susceptible of being made certain by averment, as has been done in this case, and as the appellants had constructive notice of appellee's mortgage, the court did not err in holding her cross-complaint sufficient, or in its conclusions of law. Wade Notice, sections 183, 184 and 185.

The judgment of the court below is affirmed.

Filed Dec. 13, 1894.

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No. 17,066.

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139	653
142	197
139	653
147	542
139	653
158	86

CONTRACT.—*Parent and Child.*—*Advancement in Full Consideration of Child's Expectant Interest in His Ancestor's Estate.*—Where the father makes a contract with certain of his children, who are his expectant heirs, all of full age, by the terms of which they are to receive a present allowance, in land, by way of advancement, in full for all their expectant interest in his estate, and agree to release the estate of all claims thereafter on his death and the final settlement and distribution of the estate, such contract, in family settlement, if made freely and without fraud, is binding and valid upon all parties concerned.

SAME.—*Family Settlement.*—*Answer Setting Up Such Settlement.*—*Sufficiency of Reply to.*—*Equitable Relief.*—Where the reply to an answer setting up such contract, stated that at the time of the contract and deed the second wife, now widow, of the ancestor had a great dislike for plaintiffs, children of a former wife, and a strong and undue influence over said ancestor, and was using every persuasive means in her power to induce him to will all his property to her and her children, and cut plaintiffs out entirely, and that the contract and deed were made under the above circumstances and surroundings, by reason of which facts plaintiffs aver that by said advancements they received but a small portion of their father's estate,—it presents a case which appeals so strongly to equity that the issues as to the freedom and fairness of the contract between the father and his children by his first wife ought to be determined by the court after hearing the evidence, and not upon demurrer.

From the Parke Circuit Court.

H. B. Hensley, J. M. Johns, E. Hunt and A. M. Hadley, for appellants.

S. D. Puett, A. M. Adams, S. McFaddin, T. N. Rice and J. T. Johnston, for appellees.

HOWARD, J.—The appellants filed their complaint against the appellees, asking for partition of certain lands described.

On the overruling of a demurrer to the complaint, the appellees answered, averring that one William Brown,

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father of appellants and appellees, except the appellee Sarah J. Brown, who is his widow, died in 1893 the owner in fee simple of the lands described in the complaint, leaving the parties hereto his only heirs at law; that on July 12, 1892, the said decedent, William Brown, conveyed to appellants certain real estate and other property as an advancement and in full of their interest in his estate, which property the appellants accepted as such advancement in full of such interest in their said father's estate; that appellants are the children of said decedent by his first wife, also deceased, and the appellees Julia E. Reeder and Ella May Gray, are the children of said decedent by his second wife, and now widow, the appellee Sarah J. Brown, who, in consideration of said release by appellants of their interest in their father's estate, joined with her said deceased husband in deeding her one-third interest in the lands so conveyed by him to appellants; that appellants have and hold said land and other property so conveyed to them.

In a second paragraph of answer, it is averred, in addition, that a controversy having arisen between said decedent and his said children, the appellants, in regard to his final report as their guardian, the said William Brown and the appellants, except the appellant Sarah J. Spencer, met on July 12, 1892, for an adjustment of all differences, at which time the agreement was made that said decedent should convey to appellants said land and other property in full of all demands due, and also in full of all claims appellants or their heirs might have upon his estate at his death and final settlement of his estate, which property was accepted by them in like manner and the agreement reduced to writing, said agreement being afterwards accepted and signed by the remaining appellant, Sarah J. Spencer; that a deed was made and accepted for said land, and appellants have

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since been in the enjoyment of all said property. The agreement and the deed are made exhibits to the answer.

Separate demurrers being overruled to each paragraph of the answer, the appellants replied, admitting the making of the agreement and deed mentioned, and that they received from their father the other property referred to. But they said that at the time of said agreement the said William Brown, who had been for many years their guardian, was indebted to appellants in a large sum for property, moneys, and rents, which had descended to them from their mother's estate, and for which he had failed to account in his final report as guardian; that the larger part of the said consideration in land and other property received by them was in settlement of said guardianship indebtedness, and the residue only was received as an advancement on their interest in their said father's estate; that they were, at the date of said agreement, July 12, 1892, and are still unable to state the exact amount due them from their mother's estate so in the hands of their father as guardian, or to state how much of said consideration received by them should be charged as an advancement, but that in no event should more than two thousand dollars thereof be so charged; that at the time of said agreement their said father owned in his own right, free of all indebtedness or liabilities, real estate of the value of thirteen thousand dollars, and after conveying to appellants the lands mentioned in the answer, he continued to own up to his death, and died intestate seized of, the lands described in the complaint, of the value of nine thousand dollars, and personal property, also free from liabilities, of the value of three thousand dollars; that at the time of said agreement and deed, the appellee Sarah J. Brown, second wife of said William Brown, deceased, had a great dislike for appellants and a strong and undue influence over her said husband, and

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was using every means in her power to induce him to will all of his property to her and her children, and cut these appellants out entirely; that said agreement and deed were made and said moneys, land, and other property received under the foregoing surroundings and circumstances; that by reason of said facts appellants received but a small part of their said father's estate, and that after charging them with said amount so advanced there would still remain due them a large amount of property to equalize them with their said father's children by his second wife; that in equity there should be an accounting to determine what amount should be charged appellants as an advancement, and such amount taken into consideration in making partition of said lands described in the complaint.

To this reply a demurrer was sustained, and the appellants refusing to plead further, this appeal followed.

The written agreement mentioned in the answer and reply is as follows:

"Whereas, differences have arisen between William Brown and his four children, Sarah J. Spencer, George W. Brown, Harriett J. Holbert, and Martha A. Holbert, concerning his guardianship while guardian of said children.

"Now, it is agreed by and between said parties that said William Brown shall deed to said children eighty acres of land, to wit: The west half of the southwest quarter of section 12, in township 14, range 8, in Parke county, Indiana, at the sum of \$4,000; and, in addition thereto, he is to pay to said children the sum of \$733.35 in two years, with interest, and is to turn over to said children the one-half of the rents of all crops on said eighty-acre tract (wheat and corn) of land, which deed and money and rents are to be taken by said children in full settlement of all claims and demands they may have

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against him, said William Brown, and also in full of all right and claim they or their heirs may have in the estate of said William Brown at his death and final settlement of his estate. Which deeds and notes in settlement are in the hands of T. N. Rice, to be delivered to the said parties respectively on the signing of this agreement by Sarah J. Spencer, who is now residing in Arkansas.

“Witness the hands and seals of the parties hereto, this 12th day of July, 1892.

“WILLIAM BROWN,
“GEORGE W. BROWN,
“MARTHA A. HOLBERT,
“HARRIET J. HOLBERT,
“SARAH J. SPENCER.”

From the admitted facts, the land to be partitioned is worth nine thousand dollars. Out of this, deducting the widow's third, there would remain for the six children six thousand dollars. If to this we add the estimated advancement, we have eight thousand dollars, or somewhat less than three thousand dollars for the two appellee children and over five thousand dollars for the appellants. As the advancement to the appellants was but two thousand dollars, it is apparent that they received at least three thousand dollars less than the real value of their interest in their father's real estate as it would fall to them in case there had been no contract or advancement. If the question, then, were merely as to the adequacy of the consideration, the decision must, in equity, be with the appellants.

If this case concerned the sale of an expectancy, and the inquiry were whether the appellants (having made sale of their expectant estate, worth five thousand dollars, for a consideration of two thousand dollars) were thereby estopped from bringing that consideration into

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a court of equity and asking to have such sale set aside, we should have no hesitation in holding such sale invalid. Such a case was *McClure v. Raben*, 125 Ind. 139, relied upon by appellants. See, also, *Chambers v. Chambers*, 139 Ind. 111, and authorities there cited.

The case before us, however, does not concern a sale of an expectant estate made by presumptive heirs to a stranger, without the consent of the ancestor and for an inadequate consideration. It concerns, rather, a contract of settlement made by the ancestor himself with the expectant heirs, all of full age, by the terms of which they are to receive a present allowance, by way of advancement, in full for all their expectant interest in his estate, and agree to release the estate of all claims thereafter on his death and the final settlement and distribution of the estate.

We have no doubt that such a contract, in family settlement, if made freely and without fraud, would be valid and binding upon all parties concerned, as any other contract. *Gray v. Bailey*, 42 Ind. 349; *Bishop v. Davenport*, 58 Ill. 105; *Galbraith v. McLain*, 84 Ill. 379; *Kershaw v. Kershaw*, 102 Ill. 307; *Jones v. Jones*, 46 Ia. 466; *Smith v. Smith*, 59 Me. 214; *Trull v. Eastman*, 3 Met. (Mass.) 121; *Thornton Gifts and Advancements*, 540, and authorities there cited.

Indeed, if a father may, by will, bestow his property upon some of his children to the exclusion of the rest, as he undoubtedly may, there seems no good reason why he may not enter into a fair and open contract with one or more of his children and give in advance all that he is disposed to give; as, when it was said by one of the two sons: "Father, give me the portion of substance that falleth to me. And he divided unto them his substance." Nor do we read that when the prodigal lost his portion he came back asking for a share of that

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which was left. On the contrary, he stood by his contract, even so far as to request that he might be made a servant in his father's house.

But such a contract, like a will itself, must be freely made, and without fraud or undue influence.

It is admitted by demurrer in this case "that at the time of said contract and agreement and deed the said defendant, Sarah J. Brown, the second wife of said William Brown, had a great dislike for plaintiffs, and a strong and undue influence over said William; was using every persuasive means in her power to induce said William to will all of his property to her and her children and cut plaintiffs out entirely, and that said agreement and deed were made, and said moneys, rents and lands were received under the above circumstances and surroundings; that by reason of said facts plaintiffs aver that by said advancements they received but a small portion of their said father's estate."

These allegations are not so definite as they might be, but, taken in connection with all the other facts alleged in the pleadings, it would seem that they present a case which appeals so strongly to equity that the issue as to the freedom and fairness of the contract between the father and his children by his first wife ought to be determined by the court after hearing the evidence, and not upon demurrer.

The judgment is therefore reversed, with directions to overrule the demurrer to the reply, and for further proceedings.

Filed Dec. 19, 1894.

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No. 17,121.

139	660
150	256
139	660
164	320

THE GAS LIGHT AND COKE COMPANY OF NEW ALBANY
v. THE CITY OF NEW ALBANY ET AL.

SPECIAL FINDING.—Conclusions of Law.—When Disregarded.—A statement in a finding of facts that if the defendant is permitted to do certain things the plaintiff is without any adequate remedy, except the one he seeks to avail himself of is not a finding of fact but a conclusion of law and has no effect.

INJUNCTION.—Contract.—City.—Right to Substitute Electric for Gas Lights.—Indefinite Terms.—Where a contract between a city and a gas company for lighting the city streets for a term of twenty-three years provides that if, at any time thereafter the city shall determine that electric lights shall be substituted for gas lights the gas company "shall make the substitution of such electric lights instead of as many street lamps as may be agreed upon between the city and the company (the price at which said electric lights shall be furnished to be fixed by an equitable agreement between the city and the company,)" such contract is not sufficiently certain to be specifically enforced, and if the city determines to substitute electric lighting prior to the expiration of the contract, injunction will not lie, at the suit of the gas company, to restrain the city from proceeding to secure such lighting by competitive bids.

SAME.—Adequate Remedy at Law.—When an injury may be fully compensated in an action at law for damages where the wrongdoer is solvent, the extraordinary remedy of injunction will not lie.

From the Harrison Circuit Court.

A. Dowling, for appellant.

C. L. Jewett and H. E. Jewett, for appellees.

MCCABE, J.—The appellant sued the appellees for an injunction. Since the submission of this cause to this court the appellee, McDonald, has died, as is suggested by the appellees, counsel.

Under such circumstances the statute provides that the "judgment shall be rendered as at the term at which the submission was made without any change of parties." 1 Burns R. S. 1894, section 675; R. S. 1881, section 663.

The following judgment will therefore be entered as

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of the date of the submission, to wit, November 13, 1893. Issues were formed upon the complaint and the venue having been changed from the Floyd Circuit Court, where the action was begun, to the Harrison Circuit Court, a trial of such issues in that court without a jury resulted in a special finding of the facts upon which conclusions of law were stated by the court favorable to the appellees. The appellees had judgment pursuant to the conclusions of law.

The conclusions of law and the action of the circuit court in overruling the appellant's motion for a new trial are assigned for and as the only errors.

The appellant has waived the alleged error in overruling the motion for a new trial by failing to point out the same in its brief.

The facts found necessary to a determination of the questions presented by the conclusions of law are substantially as follows: 1. That appellant is a corporation under the laws of Indiana, located within the limits of the appellee, the incorporated city of New Albany. 2. That said city is a municipal corporation, and appellee McDonald was its mayor at the institution of the suit. 3. That on March 22, 1870, said city, by its common council, adopted and passed the following ordinance, to wit:

"Section 1. It is ordained by the common council of the city of New Albany, That Washington C. DePauw, Nelson Fordice, and George V. Howk, and their associates, successors and assigns are hereby authorized to form a gas company, under the corporate name of 'The Gas Light and Coke Company of New Albany,' and to establish gas works for the lighting of said city with gas, and to that end they and their associates, successors and assigns, under the corporate name, are hereby invested with the exclusive right and privilege, for the full term

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of twenty years from and after the 7th day of April, 1871, of using the streets, alleys, lanes, highways, and public grounds, within the present or future corporate limits of said city of New Albany, for the purpose of laying down therein the proper and necessary pipes for the conveyance of gas in and through said city, for the use of said city and its inhabitants: *Provided*, That the said company, to be formed as aforesaid, by its board of directors, shall agree and bind herself by resolution, a copy of which shall be certified to the mayor of said city within ninety days hereafter, to accept the terms and conditions prescribed in this ordinance: *And, provided, further*, That the said city of New Albany, in her corporate capacity, at any time before said 7th day of April, A. D. 1871, if she shall elect and determine to so do, shall and may become a stockholder in the said gas company to be formed as aforesaid, to an amount not exceeding one-third of the whole amount of the capital stock of said gas company, and the stock which may be taken in pursuance of this proviso shall be paid for by said city of New Albany in the manner hereinafter provided.

"Section 2. The price at which the said gas company to be formed as aforesaid shall furnish the city and its inhabitants with gas shall not exceed three dollars for each thousand (1,000) cubic feet, exclusive of government tax, provided that city orders shall be received at par in payment for all gas to be furnished the city by said company, and that the common council of said city shall have the right at all times to regulate the time of lighting and extinguishing the street lamps, and determining the quantity of gas to be consumed by the city.

* * * * *

"Section 7. The said gas company, to be formed as aforesaid, shall furnish good, pure gas for all the public lamps of said city of New Albany, and light and ex-

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tinguish the same and keep the same in good order and repair at and for the price and sum of \$18 per annum, exclusive of the government tax, for each of the said lamps. The lamp posts and lamps for the public lamps shall be furnished by and at the expense of said city of New Albany.” * * * *

4th. That afterward the terms and conditions of said ordinance were duly accepted by the board of directors of said company, by resolution duly passed by said board, which was certified to the mayor of said city on the 21st day of May, 1870, and within ninety days after the 22d day of March, 1870, the date of the passage and adoption of said ordinance.

5th. That on the 19th day of March, 1888, the common council of the city of New Albany, at a regular meeting had and held, etc., * * the following ordinance was passed and adopted, to wit:

“An ordinance supplemental to an ordinance entitled ‘an ordinance to provide for the establishment of gas works, etc.,’ passed by the common council of the city of New Albany, March 22, 1870.

“Section 1. Be it ordained by the common council of the city of New Albany, that all the rights and privileges, duties, and obligations held and enjoyed and owing by the gas light and coke company under and by virtue of an ordinance of the said common council passed March 22, 1870, and under and by virtue of the contract and agreement now and heretofore subsisting between the said gas-light and coke company of New Albany and the city of New Albany, subject to the modifications and alterations hereinafter mentioned, shall be, and the same are hereby extended and continued in force for the term of twenty-three years from and after the 7th day of April, 1888.

“Section 2. That in consideration of the extension of

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the term of said ordinance contract and agreement, the price at which gas is to be furnished by said company to consumers thereof shall not exceed \$2.10 per 1,000 cubic feet, with a discount of ten cents per 1,000 cubic feet if paid within the first ten days of the month following after the same becomes due, making the net price \$2 per 1,000 cubic feet to all consumers of 5,000 cubic feet; the price of gas shall not exceed \$1.85 per 1,000 cubic feet, with a like discount of ten cents per 1,000 cubic feet if paid within the first ten days of the month following after the same becomes due, making the net price to such consumers \$1.75 per 1,000 cubic feet to all consumers of 10,000 cubic feet and over; the price of gas shall not exceed \$1.65 per 1,000 cubic feet if paid within the first ten days of the month following after the same becomes due, making the net price to consumers last named \$1.50 per 1,000 cubic feet, exclusive of any government tax; the price of gas furnished to the city of New Albany by meter shall not exceed \$1.50 per 1,000 cubic feet, exclusive of government tax: *Provided*, That all gas furnished the city of New Albany under this ordinance the cost thereof may be paid in city orders at par, but all bills due from said city to said company shall be paid either monthly or quarterly, as the common council may elect.

* * * * *

“Section 6. The said gas company shall furnish good and pure gas for the public lamps of said city, and light and extinguish the same and keep the same in good order and repair for the price and sum of \$18 per annum, exclusive of any government tax. The said lamp posts and lamps shall be furnished by and at the expense of said city, and the said city agrees to keep in service all public lamps heretofore maintained and hereafter ordered

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under this ordinance, except the same is removed by agreement of said council and said company.

"Section 7. That if, at any time after the passage of this ordinance, the said common council should determine that electric lights should be substituted for gas lights upon the streets of said city, or any part thereof, the said gas company shall make such substitution of such electric light instead of as many public street lamps as may be agreed upon between the said city and said gas company, the price at which said electric lights shall be furnished to be fixed by an equitable agreement between the said common council and said gas company.

* * * * *

"Section 9. That all ordinances and parts of ordinances now existing and in conflict with the terms of this ordinance are hereby repealed."

Section 10 provides that said ordinance is to take effect on the filing with the city clerk of a certified copy of the resolution of the board of directors of said gas company accepting the terms and conditions of the ordinance, and thereupon it is made the duty of the mayor to publish the ordinance and resolution of acceptance in the same manner that other ordinances are published. Such resolution of acceptance was filed with the city clerk.

7th. That on December 21, 1891, the common council of said city repealed section 6 of the ordinance passed March 19, 1888, supplemental to the ordinance above mentioned, passed March 22, 1870, providing for the establishment of gas-works. And the second section of said repealing ordinance was in the form of a resolution of said common council, to the effect that all gas lamps used for street lighting within the territory bounded on the south by the south line of Main or High street, on the east by the east line of Upper Fourth street, on the

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north by the north line of Upper Oak street, and on the west by the west line of State street, and that the use of gas be discontinued for street lighting within the limits above prescribed, and the mayor is ordered to notify the gas-light and coke company that the lamps within said territory will not be used by the city on and after January 1, 1892. And the mayor was directed and empowered to take all necessary steps to prevent the use of gas in such lamps after January 1, 1892. And it was further resolved at said meeting that a committee be appointed, consisting of the mayor and three councilmen, to ask the different companies for bids for lighting the above named district with electricity, and to contract the same.

8th. That on December 22, 1891, the mayor, Morris McDonald, pursuant to the direction of said resolution, notified the appellant, in writing, of the above resolution, and that said gas company need not furnish gas within said territory after the time indicated in said resolution. And, on the same day, also notified appellant that proposals for furnishing 26 arc lights for the purpose of lighting that part of the city within the above named boundaries with electric lights, required to burn all night for every night in the year, for one year, with the option of the city to renew at the expiration thereof for a period not exceeding five years, were invited; that the light must be furnished on or before January 10, 1892; that appellant was invited to submit proposals therefor up to 10 o'clock A. M. on Saturday, December 26, 1891, when the bids for the same submitted by appellant and the other company invited to bid will be opened at the mayor's office.

9th. That on December 23, 1891, the appellant, in reply to the several notices above mentioned, addressed to the appellees a letter stating that "In accordance with

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the provisions of section 7 of an ordinance of said city passed March 19, 1888, and accepted by appellant, if it is the determination of the common council that electric lights be substituted for gas lights upon the streets of said city designated in your letters, the appellant is ready to make such substitution * * placing one electric light in place of as many gas lamps as may be agreed upon between said city and said gas company. The gas-light company further agrees that the price at which said electric lights shall be furnished shall be fixed by an equitable agreement between said common council and the appellant, and the said gas company and the officers of said company will at any time meet the proper officers or a committee on behalf of the city * * * to make such agreement."

10th. That on December 24, 1891, the city, appellee, through its mayor, addressed to appellant, in response to its communication mentioned in the last preceding finding, that the city will be pleased to receive any bid from appellant for furnishing electric lights within the territory above mentioned, assuring the appellant that the contract would be awarded to it if its bid should be the best received.

11th. That appellant had no notice of the intention of the city to make any change or substitution of electric lights within the territory covered by its resolution and ordinance passed on December 21, 1891, prior to the adoption thereof, and the only notice it had concerning the same was that contained in the letters of its mayor, dated December 22, 1891.

12th. That the only proposition made by the appellant to the appellee relating to the substitution of electric lights was and is such as is contained in its letter of December 23, 1891, heretofore referred to.

13th. That at the time the appellant received such

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notice of the proposed substitution of electric for gas lights in that portion of the city embraced in the territory hereinbefore set out, and of the intention of the city to let the contract for electric lighting by competitive bids therefor, the appellant had no intention to make any bid therefor or enter into competition with any other rival company for such contract, but intended then and ever since has and still relies upon its exclusive right under its construction and interpretation of the terms and conditions of the ordinances hereinbefore set out to furnish such lighting.

14th. That the appellee city through its officers, assuming to act under the authority conferred upon them by the resolution of its common council of December 21, 1891, was threatening to let the contract for lighting the public streets within the limits in controversy with electric lights, and had invited from appellant and other corporations bids, and proposed to award the contract therefor to the lowest and best bidder, and still insists on the right to do so, and will unless restrained do so.

15th. That the appellant accepted the terms and conditions of the ordinance of the appellee city passed and adopted March 22, 1870, and relying thereon both the city and the appellant proceeded to act under the same, and thereafter continued so to do until the 22d day of December, 1891, and appellant, pursuant to the provisions of said ordinance, proceeded to lay out and expend large sums of money aggregating \$60,000, up to the 22d day of March, 1888, in laying down gas mains, pipes, constructing ovens, furnaces, retorts, tanks, machinery, fixtures, and other necessary appliances upon the faith of such contract and agreement, and to enable it to perform the conditions thereof on its part; that since the adoption and acceptance of the supplemental ordinance of March 19, 1888, appellant has expended, in order to

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improve its buildings, property and machinery, and upon the faith of such extension of its franchise and privileges thereby secured, the sum of \$40,000 to add to its facilities and enable it to render more effectual service.

16th. That appellant fully performed all the conditions incumbent upon it under the terms of said ordinance and contract, to the satisfaction of appellee city up to and until about the 21st day of December, 1891; that about that time the lamps located in some portion of the business center of said city and including that portion now in controversy fail to give as bright a light as they had usually done theretofore for some reason not definitely shown, of which fact no complaint had been officially made to appellant.

17th. That appellant, at the date of the attempted repeal of section 6 of the supplemental ordinance hereinbefore set out and the proposed change in the lighting of the portion of said city now in controversy, to wit, on December 21, 1891, had and possessed a valuable gas-plant well equipped with all the latest and best improved machinery and appliances, with mains, pipes and fixtures laid and distributed through the different streets, alleys, highways, and public grounds, in said city with service pipes and mains, to the various public lamps in the streets of said city, as well as private lamps of the private consumers of its gas throughout said city; and was at that time engaged in supplying the city lamps with gas and lighting the same under the terms of its contract with said city at and for the price and sum of \$18 per lamp per annum; and all other private consumers at and for the price stipulated in said supplemental amended and modified ordinances of 1888; that at that time there were 555 gas lamps belonging to and in use of the city to which the appellant was furnishing gas and lighting under the terms of said contract; that the

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appellant is now supplying and lighting all the public street-lamps of said city under the terms of its said contract and ordinance, other than the public lamps within the territory in controversy in this suit; that appellant continued to supply, furnish, and light in all respects agreeably to the terms of the contract and ordinance, except as hereinbefore specified, until the 1st day of January, 1892, at which time said city, after appellant had refused to comply with the appellee city's request, not to further light them, and to prevent the use and lighting of said lamps, removed the burners therefrom and otherwise so dismantled 44 of such lamps as that the appellant could not use or light the same; that within a short time thereafter, and during the month of January, 1892, the city, for a like purpose, removed from the remainder of said public lamps situate within the territory in controversy in this suit, to wit, 40 lamps, the burners and fixtures, and so dismantled them as to prevent the lighting thereof by the appellant; that they have ever since remained out of service, but that appellant has always maintained its readiness and been at all times fully prepared to furnish gas, and light said lamps and is now fully prepared and ready to furnish and light said lamps in accordance with the terms of said ordinance, as it had done theretofore and would have done so had it not been prevented.

17½. That if the appellee city is permitted to and does go on and consummate its threatened purpose of letting the contract to some other person or corporation, for lighting that portion of said city within the boundary hereinbefore described, either by gas or electricity, in the manner proposed and threatened and in disregard of appellant's rights, as it construes and assumes them to be under the terms of its said contract with said city, the appellant's said gas and electric plant would be greatly

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depreciated in value and the profits materially reduced, and appellant would be subjected to great injury and damage and be without any adequate remedy except the one of which it seeks to avail itself in this proceeding.

18th. That in consideration of the extension of the appellant's franchise and contract under the terms of the supplemental ordinance of March 19, 1888, and its privileges thereby secured of furnishing the appellee city with gas and light for its public streets, embraced in the terms of its ordinances during such extended time, and the further consideration of the provision therein contained, securing to the said city the right at any time it should choose to make such election to substitute electric lights instead of gas lights in said city, or any portion thereof, and to enable it to be prepared for such a contingency, should it arise, as well as the further consideration of keeping along with the needs and demands of the times, and to enable it to supply private consumers with such improved methods of lighting as they might require; the appellant, shortly after the acceptance of said ordinance and during the time intervening since that date, and prior to December 21, 1891, established an electric light plant in the said city and expended about \$30,000 in the purchase of machinery, dynamos, poles, wires, posts, masts, skeleton towers and other appliances necessary to the successful operation of such plant; that at the date of the attempted substitution of electric lights by the appellee city, the appellant had its electric plant in such a complete state through that portion of the city now in controversy, its poles distributed at the street intersections and its dynamos ready for use, and would have been ready to have made the substitution of electric light in lieu of gas light in that portion of the city now in controversy, in compliance with the terms of her contract with the appellee city and said

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ordinance, upon reasonable notice therefor and agreement between them as to the number and location of such electric lights; that it has ever since been, and now is, fully prepared to furnish appellee city with electric lighting within the territory in controversy; and has ever since been, and now is, willing to do so upon the terms and conditions stated in its letter to the appellee city of December 23, 1891, heretofore referred to, as a compliance with what it construes the terms of said contract to be.

19th. That at the date of the proposed change and substitution of electric lights by the appellee city, and the proposed letting of the contract by the city for electric lighting, to wit, on December 21, 1891, there was organized and existed another electric-light plant in the said city, under the name of the Light and Heat Company, with full facilities and capacity to furnish electric lighting in that portion of said city now in controversy, which was, and is, desirous of bidding for said work, and has since been, and now is, able and willing to accept such contract and perform the same, if it should be awarded to it upon any bid it might make therefor in competition with appellant or otherwise.

20th. That at the time appellee city attempted to substitute electric light upon its said streets and discontinue gas lights thereon, to wit, on December 21, 1891, in that part of said city in controversy, the appellant had no notice that said city desired to substitute electric lights for any of the public lamps of said city; that it was not then, nor prior thereto, nor since that time, asked or notified to agree or confer with said city or its officers, agents or representatives as to the number of public lamps so to be discontinued or the number of electric lights to be substituted, nor the places at which they were to be put; and that no agreement as to the discon-

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tinuance of any of such public lamps has at any time been made between it and said city; that no offer or attempt has been made by the appellee city at any time to fix by equitable agreement between it and appellant the price at which the electric light provided for in the contract and ordinance of March 19, 1888, should be furnished by the appellant, and that no proposition therefor fixing the number, location, or price of such lights has ever been submitted by appellant to said city.

21st. That the appellee city has declared its intention not to pay appellant for furnishing and lighting the public gas lamps of said city in controversy after January 1, 1892, and has not, since that date, paid anything thereon.

22d. There would be due appellant on account of such gas lamps in controversy, on account of appellant being prevented from lighting said lamps in accordance with the terms of its contract, if it has been wrongfully interfered with by the appellee city, its agents, officers and representatives, of profits it would have made thereon, \$224.

23d. The assessed value of the property in the said city for the year 1892 is \$11,000,000. The actual value of taxable property in said city is about \$15,000,000, the present indebtedness is \$400,000, the said city being solvent and responsible.

24th. That considering the population, size and business interest of said city, and the improved methods of lighting the same, by the establishment of electric plants for lighting purposes in such city, and the reduced rates at which such lighting can now be obtained, and could, at the date of the proposed substitution, as well as the superior quality of the light thus afforded over that existing at the date of the passage of the supplemental or-

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dinance extending appellant's contract twenty-three years from April 7, 1888; and at the date of the proposed substitution, viz., December 21, 1891, the public interest, as well as private comfort and convenience of the citizens of that part of the city now in controversy demand, and did, at said last mentioned date, demand, a substitution of electric lighting for that of gas, and that said proposed change and substitution by said city at that time was in compliance with a general desire and demand of her citizens, and to promote the public interest and welfare of the city.

And the court stated its conclusions of law upon the foregoing facts as follows:

1. That that part of the contract set out and referred to in the plaintiff's bill of complaint, and which furnishes the basis of this controversy, is so uncertain and indefinite, and of such a nature and character as that the same is incapable of being specifically enforced in a court of equity.

2d. That considering the relative convenience and inconvenience to the respective parties, less inconvenience would result to the plaintiff by refusing the injunction than to the defendant by granting the same.

3d. That on account of the uncertainty in the terms, and the alleged breach of that part of the contract set out in the plaintiff's bill and referred to in the findings, and involved in the controversy, the plaintiff's bill is without equity, and is not, on this ground, entitled to the relief prayed.

4th. That for all the injuries shown to have been sustained by the plaintiff by any actual breach of the contract in suit, so far as the same is capable of enforcement, the plaintiff has an adequate remedy at law in an action for damages, and that the plaintiff is not entitled to a

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perpetual injunction, for want of equity, and that defendants ought to recover their costs.

That part of the finding of facts which states in substance that appellant is without any adequate remedy, except the one it seeks to avail itself of, is not a finding of a fact but is a conclusion of law, which has no force or effect whatever in and among the finding of facts. Conclusions of law erroneously cast into the finding of facts do not control, for the court must act upon the facts found. *City of Indianapolis v. Kingsbury*, 101 Ind. 200; *Kealing v. Vansickle*, 74 Ind. 529; *Stalcup v. Dixon*, 136 Ind. 9.

Two questions arise on the conclusions of law which have been ably discussed in the briefs on both sides:

1. Does equity afford relief by way of injunction?
2. Are the ordinances set out binding and obligatory on the city?

Counsel for appellant earnestly contend that injunction is the proper remedy, and that on the facts stated in the special finding, the appellant was entitled to a perpetual injunction against the city. In support of this contention counsel quote and rely on section 1106 of High on Injunctions, which says: "While the remedy for past violations of contract is to be sought only in courts of law, the protection of contract rights, and the enforcement of specific covenants are matters which are properly cognizable in courts of equity. The jurisdiction by way of interlocutory injunction to restrain the violation of contracts is based upon the necessity of protecting the legal right, and is exercised for the prevention of irreparable mischief. To warrant a court of equity in interfering, the contract itself must be free from doubt, and the injury apprehended from its violation must be of such a nature as not to be susceptible of adequate compensation in damages at law."

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But counsel fail in their argument to show that the facts found bring the case within the rule above laid down. They do not and can not show that the contract is one that makes the complainant's demands free from doubt. The contract, couched and embodied in the passage of the ordinances on the one side, and the acceptance of and reliance upon the terms thereof on the other, clearly contemplates that at any time after the passage of the supplemental ordinance of March 19, 1888, the common council might determine that electric lights should be substituted upon the streets of said city, or any part thereof, and that such substitution should be made by the appellant gas company. The finding shows that the city determined that such substitution should be made in the district or portion of the city specified, on and after January 1, 1892. But the ordinance left the number of electric lights to be furnished in place of the gas lamps, and the price of the electric lights, to be fixed by an equitable agreement between the city and the gas company, to be afterwards made.

The contract then clearly gives the city the right to demand the substitution. This is conceded by the gas company, appellant, as shown by the findings of fact. It shows that it is ready, willing, and prepared to make the substitution, but it, in effect, says, as shown by the findings, that the substitution must be made, if at all, upon the terms as to price and number of lights as the gas company shall dictate; and if its terms are not complied with on the part of the city there can be no agreement as to price and number of electric lights, and hence that part of the contract giving the city the exclusive right to require the substitution to be made is completely defeated. This result reached under the amendatory or supplemental ordinance extending the gas company's contract for twenty-three years, it insists that it has a

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right not only to go on and furnish the city with light according to the old and discarded method of lighting cities, at the old price for twenty-three years, in spite of the provisions in the contract that the city should have the right of requiring the company to substitute electric lights, but it insists that the city shall not get any other company to furnish electric lights. It is true, it says it is ready to agree with the city authorities as to price and number of electric lights to be furnished, but it not only objects to entering into competitive bids for such work with another company, but it nowhere says that it has offered or proposed to furnish and substitute the electric lights at such price as they are reasonably and fairly worth. The contract relied on contemplates that they were to be furnished at what they were reasonably and fairly worth, because it says "the price at which said electric lights shall be furnished to be fixed by an equitable agreement between the common council and the gas company."

Equitable is defined by Webster as meaning "marked by a due consideration for what is fair, unbiased or impartial." Therefore, the agreement provided for in the ordinance must be marked by a due consideration for what is fair. An agreement forced on the city as a choice between that and doing without electric lights for 23 years would not be an equitable agreement. This is an attempt to invoke the equity powers of the court to wield the extraordinary arm of its power to enjoin the city from violating its alleged contract. The terms of the whole agreement between the parties has not as yet been definitely settled; and for that reason this extraordinary remedy can not be invoked according to the principles laid down in the quotation counsel has referred us to. It is also a familiar rule in equity that he who seeks equity must do equity. Had the appellant offered to en-

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ter into an agreement with the city, to substitute the electric lights at such price as they were fairly and reasonably worth, it would have occupied a much more favorable attitude in a court of conscience. It is true, in a court of law it might be just as incumbent on one party as the other to tender performance, but in a court of equity, seeking relief in the nature of specific performance, it is incumbent on the complaining party to tender performance. *Mather v. Scoles*, 35 Ind. 1; *Vawter v. Bacon*, 89 Ind. 565.

Courts will refuse specific performance on the ground of incompleteness of the terms, or of the uncertainty in the construction or in the application of the terms of the contract. If the parties have made no certain and definite contract, the court will not make a contract for them. Uncertainty in the following particulars has been held to defeat a claim for specific performance, viz: Uncertainty and indefiniteness as to the promise itself, as to the time and mode of performance, as to the amount of consideration, and as to when the consideration was to be paid; so specific performance has been refused where it was provided that the purchase-money must be paid on such terms as may be agreed between the parties. *Lawson Rights and Remedies*, section 2608; *Bowman v. Cunningham*, 78 Ill. 48; *Hamilton v. Harvey*, 121 Ill. 469.

In High on Injunctions, section 1120, it is said: "So, too, if there are disputes concerning the rights of the parties under the * terms and obligation of the contract itself, an injunction will be withheld until the rights of the parties are ascertained and adjusted."

And in section 1121, the same author says: "Upon similar principles, it is held that an injunction will not be granted in aid of an action for specific performance, when the agreement which it is sought to enforce is so

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uncertain in its terms as not to be the subject of a decree for specific performance."

Unless we eliminate that provision in the contract relating to the substitution of electric lights for gas lights the terms of the contract between the parties are too uncertain and indefinite to warrant interference by a court of equity by injunction. To do that would be to defeat the intention of both parties to the contract. Had the circuit court granted the perpetual injunction asked for, the city never could have substituted electric lights for gas lights for 23 years after April 7, 1888, so long as that decree remained in force, unless it did so at the expense of paying therefor whatever the appellant gas company might see fit to charge or demand for the same; that would be giving the appellant an unconscionable advantage. A court of equity will not afford relief to a party by way of injunction where it will result in such unjust consequences.

It is further said, in *High on Injunctions*, section 1106, that, "While the remedy for past violations of contract is to be sought only in courts of law, the protection of contract rights and the enforcement of specific covenants are matters which are properly cognizable in courts of equity. The jurisdiction by way of interlocutory injunction to restrain the violation of contracts is based upon the necessity of protecting the legal right, and is exercised for the prevention of irreparable mischief. To warrant a court of equity in interfering, the contract itself must be free from doubt, and the injury apprehended from its violation must be of such a nature as not to be susceptible of adequate compensation in damages at law. And a doubt as to the correctness of the construction of the contract on which the injunction is asked is sufficient ground for refusing to interfere. Nor will an injunction be allowed to restrain the violation of

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a contract tainted with champerty and maintenance. And if the contract is uncertain and vague in its provisions, or is of an unjust and oppressive character, the relief will be withheld."

Section 1107, same author, says: "The fact that ample remedy exists at law for the violation of an agreement, is always a sufficient objection to the interference of equity. Thus, where a railway has been constructed under a contract whose terms provide for its construction in a particular manner, for the protection of the owners of real estate over which the road passes, the remedy for violation of the agreement is not by enjoining the use of the road until the terms of the contract are complied with, but by an action at law for pecuniary damages, and in such a case equity will not interfere."

To the same effect are *Allen v. Winstandly*, 135 Ind. 105; *Champ v. Kendrick*, 130 Ind. 545; *Hendricks v. Gilchrist*, 76 Ind. 369; *Ricketts v. Spraker*, 77 Ind. 371; *Caskey v. City of Greensburg*, 78 Ind. 233.

The finding shows that appellant had an adequate, complete and efficient remedy at law in an action for damages for a breach of the contract, even though the appellants' construction of the contract is the correct one.

Conceding that the city wrongfully repealed the sixth section of the supplemental ordinance of March 19, 1888, by which the city undertook to bind itself to keep in service all public lamps theretofore ordered, except the same be removed by agreement of said city and said company, and that it further violated its contract obligations to the gas company when it ordered all street lamps within the district in controversy to be taken out of service, yet the finding shows that the amount of appellant's damages occasioned by such alleged breach of contract is easily ascertainable, and in fact was ascer-

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tained by the court as far as they had accrued, and that the city was solvent and able to pay it.

Assuming that the appellant's contention is tenable that it is not bound to enter into competitive bids with other companies to get the contract to furnish the electric lights, and that it is not bound to agree to furnish such lights at such price as they are reasonably and fairly worth, and that by its refusal or failure so to do, the original contract of \$18 per lamp per year for furnishing gas still remains in force, and assuming that the threatened letting of the contract to another company will deprive appellant of the power of complying with its contract in furnishing gas for the lamps within the district in question, for the whole unexpired period of time its contract was to run, yet the finding shows that appellant had a remedy at law which was as adequate, complete, and efficient as any equity could afford. When an injury may be fully compensated in an action at law for damages where the wrongdoer is solvent, the extraordinary remedy of injunction will not lie. See the authorities last above cited. Also, *Laughlin v. President, etc.*, 6 Ind. 223; *Smith v. Goodknight*, 121 Ind. 312.

The court, therefore, did not err in its conclusions of law.

We intimate no opinion as to the validity of the ordinances in question, for the reason that it is unnecessary, and because, as we are informed, that question is being litigated in another action between the parties.

The judgment is, therefore, affirmed.

Filed Dec. 14, 1894.

Sheets, Administrator, v. The Chicago and Indiana Coal Railway Co.

No. 16,821.

**SHEETS, ADMINISTRATOR, ETC., v. CHICAGO AND INDIANA
COAL RAILWAY COMPANY.**

MASTER AND SERVANT.—RAILROAD.—Unblocked Frog.—Injury to Brakeman.—Ignorance of Blocking Device.—Assumption of Risk.—A brakeman upon a railroad not using blocks in its frogs and switches, who is killed in the line of his service by getting his foot caught in an unblocked frog, and who at the time of the accident had no knowledge that such protecting devices as blocks were in use upon any railroad, will be held to have assumed the risk, although it is averred that he had no time or opportunity to observe whether or not the particular frog was blocked.

SAME.—“Kicking” Cars Into Switch.—Rule of Company.—Where a freight conductor gives an order to place cars upon a side track, and couple them with others standing upon said side track, without instructions as to the manner of doing it, and the trainmen in executing the order make a “kicking” switch, and a brakeman, voluntarily going in front of the detached, uncontrolled, and rapidly moving cars to make the coupling gets his foot fastened, in an unblocked frog, and is run down and killed, an action will not lie against the company, even though the latter had in force no rule prohibiting the making of switches of the character alleged.

SAME.—Fellow-Servants.—Incompetent Fellow-Servant.—Voluntarily Going into Danger Caused by.—Attempting to Make Perilous Coupling.—An engineer is a fellow-servant of a brakeman, and a recovery against the railroad company for the death of the brakeman by a negligent act of the engineer in kicking cars into a siding at an excessive speed, even if the company had knowledge of his incompetency, and the brakeman had not, will not be allowed where it appears that such brakeman being experienced, and with knowledge of the excessive speed, and of the danger of attempting to couple the detached cars to others standing upon the sidetrack, undertook such perilous task as a brakeman, even when acting in pursuance of an order to couple the cars, as he is not bound to do so under such dangerous conditions.

From the Fountain Circuit Court.

E. F. McCabe, for appellant.

I. E. Schoonover, *A. Schoonover*, *W. H. Lyford* and *W. J. Calhoun*, for appellee.

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DAILEY, J.—This was an action for damages, brought by the appellant against the appellee, for alleged injuries resulting in the death of John Sheets, appellant's intestate. The complaint was in four paragraphs. The court below sustained a demurrer to the first, second and fourth paragraphs. Appellant, thereupon, withdrew the third paragraph, and elected to stand by the remaining paragraphs, and judgment on the demurrer was rendered in favor of the appellee. The appellant assigns as error the ruling of the court as above stated; and this leads us to a consideration of the respective paragraphs of the complaint. Stripped of all legal verbiage, the first paragraph alleges, in substance, that appellant's intestate was a brakeman on appellee's line of railroad; that while the deceased was discharging his duties in that capacity, he was called upon by the conductor to couple some cars then being switched on to a side track, to other cars then standing on the same track; that he went in front of the moving cars, and while engaged in adjusting the link or pin so as to make the coupling, his foot caught in an unblocked frog or switch-angle, resulting in the deceased being thrown down, run over by the cars, and killed. Negligence is charged against the appellee in not having the frog or switch "blocked" with a piece of wood, which, it is alleged, would have prevented the accident. It is further alleged that the decedent did not know, and had no means of knowing that the place in question was not blocked; that at no time while he was in appellee's service did he have the means or opportunity to inspect this frog or angle to discover said defect in the track; that at the time he was killed, the ground was covered with snow, so that it was then impossible to discover the absence of the block. Up to this point the complaint seems to be drawn upon the theory that the deceased had no reason

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to suspect that the frog or angle was not blocked. It is not charged but that he knew the frog or angle was there; the inference, therefore, is that he did know it; but the excuse is made for him, that at no time did he ever have an opportunity to observe that there was no block at this point. The further inference to be drawn from this allegation is, that the deceased presumed, or had the right to presume, that at this point there was a block. It is not alleged in the paragraph, or elsewhere in the complaint, that blocks were in use at any frog, switch or angle on the entire road. So it can not be claimed that deceased had any right to suppose that this particular place was blocked. Indeed, this paragraph, by express terms, shuts out any such supposition, for it is alleged that: "Said decedent did not at any time know of the use of such blocks or other device to protect persons on railroad tracks against such accidents." The conclusion must be then, that the deceased had no reason to suppose that any frog, switch or angle, with which he might come in contact, would be blocked, for he did not know that such devices were in use on this or any other railroad, as he had never seen nor heard of them. The only conclusion that can be drawn from the entire paragraph is, that none of the switches or frogs on this railroad were blocked, and the deceased knew it. It is true, the paragraph does not state how long he had been in the service, but it is not claimed that he was inexperienced, nor that he was not well acquainted with the general condition of the tracks, frogs and switches on the road. The duties of a brakeman include the handling of switches, and the coupling and switching of cars, and in the performance of these duties, he could readily learn if blocks had been provided to lessen the danger of the service. The danger incident to an unblocked frog or switch is in no sense a latent one. On

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the contrary, it must be obvious to the most casual inspection. Any man of mature years must know that if he puts his foot into an acute angle formed by two converging lines of rail, there will be danger of his foot being caught or held thereby. It is the law that, where a man engages in a service, the duties of which require him, at times, to walk over, across or about such angles, which he knows to be unblocked, he must be held to know that the making of a misstep is one danger he will have to meet, and against which he will have to guard. If, with this knowledge, he elects to continue in such service, then, under the law, he must be held to have assumed the dangers so plainly incident thereto. Upon this principle, the courts have held that a brakeman, who voluntarily continues in the service of a company, on the line of whose road the switches and frogs are not blocked, can not recover for injuries received from having his foot caught therein.

In the *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440, the facts found by the jury, in their answers to special interrogatories, were almost identical with the allegations of this paragraph, and as applicable to the facts so found, the court said: "The servant, when he enters into the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service; and the master or employer impliedly agrees that he will not subject his servant, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to the particular service in which the servant is to be engaged. The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger." The court,

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therefore, held, that upon the law and facts found by the jury, the company was not guilty of such negligence as made it liable for the injury received; but that it was the result rather of an accident, the risk of which the employe must be deemed to have taken upon himself when he entered upon the service. The learned counsel for the appellant, in the case at bar, evidently was aware of this decision, and has attempted to evade it, by alleging in substance that the deceased "did not know, and had no time, or opportunity, or means of learning of the want of a block or other device at said point in the angle where his foot was caught, * * * and at no time, while in defendant's service, did he have the means or opportunity to inspect said angle to discover said defect in said track." The want of information alleged is limited to this particular place; but when we consider the other allegation, that he "did not at any time know of the use of such blocks or other devices to protect persons on railroad tracks against such accidents," we must understand that the deceased had never seen a block or other device used in any frog, switch or angle on the line; that there were none used, and he knew it; so this allegation of a want of knowledge of the condition of this particular switch does not aid the complaint, as he had no reason to suppose, and did not assume that there was a block in the switch.

The appellant apparently attempts to distinguish this case from the one from which we have quoted, by the averment that such blocks have been in use for over fifteen years; that they are no longer an experiment, but a safe and cheap device; and that they are used by all the principal railroads in the United States. These allegations confirm the view we take of this paragraph, as already expressed, viz., that it, in effect, says there were no

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blocks in use on this road; that the deceased knew the fact, and with such knowledge continued in the service.

The claim is, therefore, made that the appellee was negligent in not constructing its track in a proper manner, or in not furnishing proper equipment therefor, so as to make the same safe to the employes while engaged in the discharge of their duties. Conceding that these blocks are a practical device, and reasonably adapted for the purpose of protecting frogs and switches, the fact that there were no blocks used could be easily ascertained by any one inclined to look at them; the danger incident thereto was obvious, but easily avoided by the exercise of reasonable care. It is not claimed that the switch was improperly constructed, or that it was not suitable for the purposes for which it was intended, or that the danger to persons in getting their feet caught therein could not be avoided. It is not a case of the use of obviously defective machinery or implements with which the deceased was called upon to work, of which defects he had no knowledge; it is not a case of conditions involving secret defects not obvious to the servant, the existence of which the master knew or ought to have known. That the switches on this line of road were unblocked, was known to both master and servant, and whatever danger was incident thereto, was apparent to both. There was no fraud, no suppression of conditions, and no misunderstanding as to contingencies.

In *Griffin v. Ohio, etc., R. W. Co.*, 124 Ind. 327, it was said: "It has been too long settled to admit now of controversy that when a servant enters upon an employment which is, from its nature, necessarily hazardous, he assumes the usual risks and perils of the service. In such cases it is held that there is an implied contract on the part of the servant to take all the risks fairly incident to the service, and to waive any right of action

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against the master resulting from such risk. * * *
Where the danger is alike open to the observation of all, both the master and servant are upon an equality; and the master is not liable for an injury resulting from the dangers of the business."

It was also held in *Ames, Admr., v. Lake Shore, etc., R. W. Co.*, 135 Ind. 363, that when an employe is injured by defective appliances in the line of his duty, and the employe knew of such defect, or had an equal opportunity with his employer to know thereof, damages can not be recovered for injuries resulting therefrom.

In *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566 (568, 569), this court said: "The employer does not, however, become an insurer of the employe against injury, nor does he covenant to supply tools and appliances that are safe beyond any peradventure or contingency, nor to furnish implements of the best, or of most approved or any particular design."

In the *Lake Shore, etc., R. W. Co. v. McCormick, supra*, 446, it was said: "Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for any injury which may occur to them in the use of such implements or machinery."

The doctrine is well sustained by authority, that if the danger incident to the use of frogs and switches, or other appliances or machinery, was such as to be easily apparent to the servant, and he saw fit to continue in the

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service under such conditions, then he assumed all the risk incident thereto. *Umback v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Spencer v. New York Central, etc., R. R. Co.*, 67 Hun, 196; *R. W. Co. v. Davis*, 54 Ark. 389; *Appel v. Buffalo, etc., R. W. Co.*, 111 N. Y. 550.

It is held, generally, that the operation of a railroad without blocking its frogs is not, as a matter of law, negligence. *Missouri Pacific R. W. Co. v. Lewis*, 24 Neb. 848; *Hewitt v. Flint, etc., R. R. Co.*, 67 Mich. 61.

In view of these authorities, we think the court did not err in sustaining the demurrer to the first paragraph of the complaint.

The facts alleged in the second paragraph, briefly stated, are as follows: Defendant's train was at Oxford, Indiana. The conductor in charge gave orders that five cars in the train should be detached therefrom and placed upon the side track, and that they be coupled to other cars then standing upon the side track; that the conductor ordered the deceased to do said coupling; that in pursuance of said order, the five cars were detached from said train, and were by the engine taken past the switch stand; the switch was then opened, and the engine being put in rapid motion, the cars were given what is termed a "kick;" that as they came onto the side track the deceased, in obedience to said order of the conductor, "went in front of said moving cars to arrange the link and pin so that the coupling could be made as soon as the cars came together, so that they could not bounce apart, and while so engaged, and while moving along with said cars and arranging said link and pin, his foot caught in an unblocked space between two rails and he was thrown down by the moving cars and killed."

The negligence on the part of the defendant, charged in this paragraph, and upon which a right of recovery is

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sought to be maintained, is that the death of the deceased was caused by the negligence of the appellee in failing to "provide any rules regulating the 'kicking' of cars into side tracks." It is alleged that the "kicking" of cars is extremely dangerous, and should never be resorted to unless absolutely necessary; that while the appellee had in force a rule prohibiting the making of switches unless absolutely necessary, yet it failed to make a rule regulating or prohibiting "kicking switches."

It is then averred that: "If some rule had been enacted by defendant prohibiting such switches, except where absolutely necessary, the decedent would not have been run down and killed." By the terms of this paragraph, we are told that a train crew, of which deceased was a member, was engaged in making a running or "kicked" switch. It is not averred that any one ordered the work done in the particular manner observed on this occasion. The only instructions given by the conductor were, that the cars should be put in on a side track. These trainmen, the coemployes of the deceased, with whom he was then working, for some reason saw fit to do this work by what is termed "kicking" the cars in on the side track. It is said that this was a dangerous way to side-track cars. It was probably so, because the cars were set in rapid motion, and allowed to run in on the side track, detached from the engine or any other controlling power. This was the act of coemployes of the decedent, in the commission of which he assisted, and by reason whereof, he was injured. He must be presumed to have known of all the dangers incident thereto. He knew what was being done; the danger was apparent to him. He ran in front of those rapidly moving cars thus detached from the engine, and while so doing, attempted to arrange the coupling attachments. This exposed him to the hazardous chances of missing his footing, of stumb-

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ling, slipping or getting his foot caught, and thereby being thrown in front of the wheels. It is not pretended that any one told him to do this, or that it was necessary or proper for him to do so. The act was voluntary on his part, and it must be conceded to have been reckless, careless and negligent. The conditions confronting the decedent, were such as to suggest danger to a degree that would have justified him in refraining from such an exposure, and especially so in the absence of any order requiring him to go in front of the moving cars. But, in this paragraph, appellant bases his right of recovery on the alleged fact that appellee had no rule, regulating the manner of making switches of the kind described, or prohibiting them being made, except when absolutely necessary. He admits, and expressly avers, that appellee had a rule in force prohibiting the making of "running" switches, except when absolutely necessary, and regulating the manner in which the same should be done, when occasion required, but complains because there was no similar rule relative to "kicking of cars into switches." Just what difference there is between a "running" switch and a "kicking" switch, does not appear. Probably the appellant means by a running switch a case where the car is pulled by the engine until it attains a certain velocity, then the engine is uncoupled, the speed of the engine is increased so that it pulls rapidly away from the moving car; after the engine passes the switchstand, the switch is opened, and the car, as it follows along, runs into the sidetrack.

Where cars are kicked into a side track, the engine pulls the car past the switch it is to enter, then backs towards the switch until it attains speed sufficient to carry the car into the side track; then the engine is uncoupled and stops; the car moves on until it comes to the switch, which, being opened, the car enters and is

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thus kicked into the side track. The former is certainly a running switch; that is, a car set in motion and shunted or side tracked, after the engine has been detached.

The rule that applies to one method of switching applies to the other, and the dangers, if any, must be the same in each case. Just what the rule was, regulating the manner of making running switches, is not shown, nor does appellant state what kind of a rule there should have been regulating the "kicking" of cars into switches. Appellant says: "If some rule had been enacted by defendant prohibiting such switches, except where absolutely necessary, the decedent would not have been run down and killed, for the making of a kick switch was not at all necessary on the occasion stated." But how the mere enactment of a rule by the officers or directors of the company would have prevented the deceased from running in front of the cars on this occasion, or from having his foot caught, or how it would have hindered the cars from running him down, is not made clear.

The cases of *Hildebrand, Admr., v. Toledo, etc., R. W. Co.*, 47 Ind. 399, and *Reagan v. St. Louis, etc., R. W. Co.*, 3 Am. St. Rep. 542, cited by counsel for the appellant to sustain this paragraph, are distinguishable from the case at bar, in this: In neither of the cases referred to, did the injured party have any notice of the approach of the cars, and, therefore, was given no opportunity to escape. In this case, the deceased had knowledge of the moving cars, and with that perception placed himself in front of them, and thereby assumed all the dangers incident to such exposure.

The fourth paragraph alleges that the deceased was a brakeman on a freight train, which arrived at Oxford; that the conductor in charge of the train ordered five cars in the train to be placed upon a side track, "with-

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out giving special directions as to how said switching was to be done, and then went to the depot"; that the engine and five cars were uncoupled from the train and moved forward past the switch stand; the switch was turned; the engineer then carelessly and negligently backed his engine with great and unnecessary force so as to give said cars a speed of six miles per hour or more; said cars having been previously uncoupled from the engine, the speed of the engine was slackened, and the cars allowed to run said side track without an engine attached to them; that the conductor had ordered the decedent to couple these cars to some others standing on the side track; that to obey said order it became his duty and was necessary, after said cars had been given a "kick," to arrange the link and pin of the first moving car so as to make the coupling promptly when the cars came together, before they had time to bounce apart; that in the performance of this duty, the decedent went in front of the moving cars and was engaged in arranging the link and pin; that being absorbed for a brief moment in doing this, and moving along with the cars, his foot caught in a frog, and the cars ran over and killed him.

The only act of negligence averred, that can be designated as the immediate cause of the accident, is the careless and negligent act of the engineer in backing or "kicking" the cars with unnecessary force or speed; but this negligence is so clearly the act of a fellow-servant, for which the appellee is not liable, that it was necessary to assert some other ground of liability on the part of the appellee. Hence it is alleged, as the gravamen of the action, that the engineer was not competent to discharge the duties of the service; that he was reckless, careless, in the habit of drinking liquors to excess, and was habitually disposed to inflict injury upon his coem-

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ployes; that all these faults were known to the appellee, both before and after his employment, or might have been known by the exercise of care; that it carelessly and negligently employed him, and with like negligence continued him in the service, and that the deceased had no knowledge of the delinquencies of the engineer.

It will be observed that the conductor simply gave orders that certain cars should be separated from the train, switched on a side track and coupled to some other cars; that he gave no directions as to how this should be done, but after instructing the deceased to couple the cars, went to the depot and left the train crew, of which deceased was a member, to discharge the duty ordered to be performed. No blame is attributed to the conductor.

It is not charged that the engineer was intoxicated at the time, or under the influence of liquor, or that he was actuated by any malevolent motives toward the deceased. It is claimed he backed the cars at an excessive rate of speed, and that the deceased had no knowledge of the incompetency, recklessness or malevolence of the engineer. It must be true that if the engineer did send the cars back with undue force, the deceased must have known it. He was a brakeman in the service of his own volition. No claim is made that he was of immature years or inexperienced. It is to be presumed that he knew and understood his duties, and the danger of coupling cars in motion at an excessive rate of speed. He was on the ground, saw the cars pushed back, and saw the rate of speed they had attained. If it was a dangerous speed, he should have refrained from making the coupling. No one ordered him to go in front of the cars under such conditions. He chose to go, with full knowledge of the danger incident to the act, if he should stumble, slip, make a misstep or fall.

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If, as asserted, this engineer was reckless and incompetent, and the deceased did not know it, he, on this occasion, had notice of the special act of negligence complained of before he was exposed to any danger. In such case he could not complain, if living; his representative can not do so now.

In support of this paragraph, appellant's counsel refers to the cases of *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294, and *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1, neither of which is in point. In both of them the injured parties had no previous warning of approaching danger, and neither was afforded an opportunity to escape from the consequences thereof. One of them was a fireman on an engine that ran into an open switch, left open by the conductor of another train; the other was riding on a train, and was injured by the careless manner in which the engineer handled the train.

We are of the opinion that the court below did not err in sustaining the demurrer to the several paragraphs.

The judgment is affirmed.

Filed Dec. 14, 1894.

No. 17,051.

ROCKLAND COMPANY ET AL. v. SUMMERVILLE ET AL.

139 695
154 89
155 874

FRAUDULENT CONVEYANCE.—*Preference of Creditors.*—*Sons Preferring Father.*—Where there is a *bona fide* preference of creditors by a failing firm, the fact that the creditor preferred was the father of the debtors does not of itself render payment to him fraudulent.

139 695
159 619

SAME.—*Burden of Proof.*—The fact that the grantee was the father of the debtors does not shift the burden of proof from those alleging fraud, and require the grantors and grantee to show the good faith of the transaction.

139 695
160 697

From the Montgomery Circuit Court.

The Rockland Company *et al.* v. Summerville *et al.*

J. L. Shrum, J. W. Paul and M. W. Bruner, for appellants.

J. West, for appellees.

HOWARD, J.—This was an action brought by appellants as judgment creditors against appellees, to set aside as fraudulent a sale of personal property and to subject the same or its proceeds to the payment of the judgments.

There was a finding of facts by the court, with conclusions of law and judgment in favor of the appellees.

The conclusions of law and the overruling of the motion for a new trial are assigned as errors.

The facts as found by the court are:

1. That in November, 1887, one Alex. F. Ramsey was the owner of a stock of boots and shoes, from which he was selling at retail in a storeroom in the city of Crawfordsville. The storeroom was then, and still is, owned by the appellee Peter C. Summerville.

2. That in November, 1887, Ramsey sold his stock of boots and shoes to the appellees, William A. and Walter K. Summerville, at the estimated price, in the way of trade, of \$3,500; that in pay therefor he received a deed for a certain lot and building thereon in said city at the estimated value of \$3,500, which lot and building so conveyed was the property of Peter C. Summerville and was so deeded in payment for said goods by virtue of an arrangement between him and his sons, William and Walter K.; that afterwards William and Walter K. Summerville executed their promissory notes for \$2,000 with interest to Peter C. Summerville, their father, which interest they paid regularly to him each month, together with rent of storeroom up to August, 1890.

3. That soon after the purchase of said stock of boots and shoes by the Summervilles, one Maurice Kelly became a member of the firm and they did business under

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the firm name of Summerville & Kelly; that previously, in the year 1882 and not thereafter, Peter C. Summerville and one Kelly had done business in boots and shoes in the city of Crawfordsville under the firm name of Summerville & Kelly; that when Maurice Kelly became a member of the firm with Summerville Bros. in 1887 he paid in cash into said firm the sum of \$1,000, which money he had borrowed from his mother, Mary Kelly, who was also the mother-in-law of Peter C. Summerville.

4. That in 1889 Maurice Kelly sold his one-third interest in the firm to the Summerville Bros., they agreeing to pay the firm debts and also to pay to Mary Kelly her \$1,000. The business was continued under the style of Summerville & Bro., and the firm paid the debt due Mary Kelly by executing to her their promissory note for \$1,000, on which note Peter C. Summerville was surety. At the time of the dissolution of the firm of Summerville & Kelly they owed the Citizens' National Bank of Crawfordsville \$1,000, which sum at the time it was borrowed Peter C. Summerville agreed to stand good for.

5. That Summerville & Bro. continued in the business at the same stand, and to all appearance seemed reasonably prosperous until, July 4, 1890, when Walter K. went to his father and said he would not longer continue in the firm, that he and his brother had fallen out, that William was dissipated and the business was going from bad to worse, and told his father to take the store and save himself for what money he had loaned the firm and what he had made himself liable for, and then gave his father the key to the store and did not return there any more to do business; that at the time William and Walter K. Summerville went into business, in 1887, they were each married and were householders, and neither had any property subject to execution, except

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their interest in the store, and so continued until the firm of Summerville & Bro. ceased to do business, and are still so insolvent, and that Peter C. Summerville has all the time been solvent, and has good business reputation.

6. That on July 10, 1890, Peter C. Summerville negotiated with William who still continued in charge of the store, for the whole stock of goods with accounts due the firm, for which he agreed to cancel and pay the \$2,000 note made to him by the firm, which was the original investment, and to pay the \$1,000 note due to Mary Kelly, on which he was security, and also the note or notes due the Citizens' Bank for \$1,000, less any amount which might have been paid on the principal; that William, on the part of the firm, accepted the proposition, and, on July 11, 1890, a bill of sale for the stock of goods with accounts due the firm, was executed by Summerville & Bro. and delivered, with the key to the store, to Peter C. Summerville, who then took charge of the same and closed the store and openly claimed to be the owner of the same and offered to sell the stock and made efforts to find a purchaser therefor.

7. That Peter C. Summerville paid and canceled all the notes and debts assumed by him in the transfer to him of said stock of goods, amounting to nearly \$4,000.

8. That the appellants are each *bona fide* creditors of the firm of Summerville & Bro.; and have recovered judgments for the several amounts of their claims, and no part of said judgments is paid or replevied.

9. That the store room remained closed, and in the open and notorious possession of Peter C. Summerville, claiming to be the owner and offering to sell said stock of goods, from July 11 to August 28, 1890, at which time he contracted to sell the same to the appellee James Kelly (not of kin to any of the appellees) for the agreed price of

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60 per cent. of the invoice to be made of the original cost price. That the invoice amounted to \$8,052. The original invoice so made appears to have been lost, not having been produced on the trial. That after the invoice and the stock were gone through, the appellee Kelly became dissatisfied and refused to make his notes for over \$3,600. That it was then agreed that Kelly should give his notes for \$3,600, in sums of \$500 each, except the last, which was for \$600 with interest, the first \$1,000 due in six months and each of the other notes six months, and as for the remainder of the 60 per cent of the invoice they were to wait and see what success Kelly would have in selling the goods. Afterwards, on July 1, 1892, Kelly executed his note for the further sum of \$1,500. That \$1,500 of the principal of said purchase-price has been paid and no more. The balance is unsecured, except by Kelly's individual notes, and is in payments yet extending over two years. Kelly is a householder and has property outside estimated to be worth \$3,500.

As conclusions of law on these facts the court found for the appellees and that the appellants were not entitled to the relief prayed for in their complaint.

There was no finding of fraud by the court, nor were any facts found from which fraud can be inferred.

The statute, section 6645, R. S. 1894 (section 4920, R. S. 1881), provides that all sales of real estate or personal property made or suffered with intent to hinder, delay or defraud creditors shall be void as to the persons sought to be defrauded.

By section 6649, R. S. 1894 (section 4924, R. S. 1881), it is declared that such fraudulent intent shall be deemed a question of fact.

Under these statutes it has been held that one alleging fraud must prove it; that fraud will never be presumed.

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Stewart v. English, 6 Ind. 176; *Morgan v. Olvey*, 53 Ind. 6; *Phelps v. Smith*, 116 Ind. 387; *Citizens' Bank v. Bolen*, 121 Ind. 301; *Fulp v. Beaver*, 136 Ind. 319.

That a debtor can not pay all his creditors and that he pays some creditors rather than others, is not necessarily fraudulent, even if the creditors paid should be relatives or friends of the debtor. *Dice v. Irvin*, 110 Ind. 561; *Thomas v. Johnson*, 137 Ind. 244; *Bump Fraud. Conv.* (3d ed.), 183.

It would seem clear, therefore, that the court did not err in its conclusions of law on the facts found.

But it is said by counsel that it was not necessary that the court should have found that the sales were fraudulent in order to find conclusions of law in favor of the appellant; that the relations of the appellees in the transactions were of a confidential nature, and therefore it was incumbent upon appellees to show that their acts were not fraudulent; that, therefore, the court not having found that the sales were free from fraud that amounts to a finding in favor of appellants on the issue of fraud, the burden of proof being upon appellees.

If the Summerville brothers were trying to recover the goods from their father, and should claim that he drove a hard bargain with them by reason of his parental influence over them, we might see some pertinency in this argument of counsel. It does not appear that the father exerted any such influence over his sons in purchasing their stock of goods; but even if he did we do not see how appellants, as third parties, could complain. The parties to the transaction are not complaining. The appellants charged fraud against all the appellees, and we think the burden was upon appellants to show such fraud before they could recover. The court, however, has found no fraud, and we must presume that none was shown.

Counsel for appellants have devoted one long brief and

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the greater part of another to an examination of the evidence with the purpose of showing that it does not sustain the findings on the question of fraud. We have gone over this discussion carefully with counsel, and have in every item of evidence adduced found some support for the court's finding. Even more; had the court expressly found that there was fraud in the sales we think it would be very difficult to pick out any evidence to sustain such finding. There was a preference of creditors by a failing firm; the debts preferred were *bona fide*; there was no concealment of any transaction. This does not show fraud. The fact that the chief creditor was the father of the debtors does not of itself render payment to him fraudulent.

We might say, besides, that appellants do not seem to have shown diligence in bringing their action to set aside the sales. The firm failed in July, 1890, and appellants' judgments were all taken from July 14 to December 26, in the same year, yet this action to set aside a sale made July 11, 1890, was not brought until May 24, 1892. It is true that the action is within the statutory period, but the open and public character of appellee's sales, both that to Peter C. Summerville, July 11, 1890, and that to James S. Kelly, August 28, 1890, would seem calculated to challenge an earlier examination into the question of fraud, if there were any.

It is a hardship if honest debts are not paid, but if there is no fraud, but simply inability to pay them, the law can afford no remedy.

The judgment is affirmed.

Filed Dec. 20, 1894.

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Authority of Agent.—Ratification.—Party Dealing With One Assuming to be Agent Put on Inquiry as to His Authority.—Adverse Interest of Agent.—Conveyance.—Deed.—Assumption Clause.—Real Estate.—Pleading.—Defects Not Cured.—L. and W. entered into a contract with H., December 14, 1887, by which they agreed to purchase certain land of H. for \$45,000. L. and W. were to execute mortgages on the several lots into which the land was to be platted, which were to be first liens on the several lots, the mortgages to bear date January 1, 1888, L. and W. agreeing to assume these mortgages as a part of the purchase-price, and agreeing to expend \$8,000 in one year, in platting and improving the tract, etc., H. to furnish them a deed and take the mortgages, as agreed to, as soon as the plat was recorded and the improvements made. L., desiring to dispose of his interest, employed W. to procure a purchaser. W. sold L.'s interest for \$12,500, to M., June 9, 1888. June 11, 1888, L. sold his contract with M. to W. On October 20, 1888, by agreement among H., L. and W., M. not being present, H. made a deed for all the land to J., acting as third party, or go-between. J. executed and acknowledged the plat, and then executed to L. notes for \$45,000, with specific mortgages on the several lots. L. indorsed the notes to H., and J. also executed a deed to W. for the whole tract, which contained the clause: "Subject, however, to mortgages bearing even date herewith, * * aggregating \$45,000 of principal, which the second party assumes and agrees to pay." W. executed a deed to M. for an undivided one-half of the plat (the relation existing between W. and M. being that of tenants in common, and not that of partners), with assumption clause as follows: "Subject to incumbrance by mortgage of even date herewith, aggregating \$43,650 and accrued interest, * * which the second party assumes and agrees to pay as his interest proportionately appears," which deed W. placed on record and notified M. thereof, M. never having seen the deed, and not knowing that it was to come from W., as his contract was with L., and having no knowledge that the deed contained the assumption clause. M. from time to time sent to W. his proportion of the expense of improving the property, also money to pay his share of the interest on the mortgage debt, and his taxes, and joined with W. in making deeds for three lots. In February, 1890, H. notified M. that the interest being unpaid the whole debt had become due, and also drew his attention to the assumption clause in his deed from W., which was the first intimation M. had of such clause fixing his personal liability for the debt, believing he had bought

the property subject simply to the mortgage debt. H. brings suit against M. on the assumption clause.

Held, that W. could not, in his own interests, make a deed to M. placing a heavy obligation upon M. in so doing, and then, as agent for M., accept the deed, with its obligation, putting the whole on record without M. ever seeing the deed or knowing its contents.

Held, also, that the interests of W. were so opposed to M.'s, in this transaction, that H. was put upon inquiry to know that M. had really agreed to the assumption of the debt, and that so momentous a matter should not have been left dependent on a statement of W., whose own interests in it were so great.

Held, also, that if W. were a general or special agent of M. in the care and management of their property, which does not appear from the facts pleaded, still that would not be enough, especially in view of the adverse interests of W., to warrant H. to take it for granted that W. was vested with the extraordinary power to assume (in M.'s name, and so as to bind him) the personal obligation to pay a debt of \$25,000.

Held, also, that as there are no facts pleaded showing that W. was M.'s agent for any purpose, much less that he had authority to insert the assumption clause in the deed, and no facts from which such authority could be inferred, the verdict finding the fact of agency can not cure the pleadings in this respect.

Held, that ratification, like agency itself, must be clearly and affirmatively established by him who relies upon agency or ratification for the enforcement of his claim.

Held, that M.'s claim of ownership of the property, his joinder in execution of deeds for lots, and his payment of his part of expenses, taxes, and interest, did not amount to ratification of the assumption clause, and were not incompatible with his title as tenant in common by a deed conveying the lands subject to the mortgages, none of which were done after he learned of the assumption clause in the deed, but which assumption clause he repudiated as soon as he learned of its existence, and reconveyed the property to W., abandoning about \$17,000 which he had invested in it.

Metzger v. Huntington, Trustee, 501

AGRICULTURAL LANDS.

See STATUTE, 2.

ALIMONY.

See JUDGMENT, 1.

AMENDMENT.

See SPECIAL FINDING, 3.

AMENDMENT OF PLEADING.

See PARTITION, 2.

ANSWER.

See CONTRACT, 3; HARMLESS ERROR, 2; PLEADING, 2; SUPREME COURT PRACTICE, 6, 7.

APPEAL.

See COUNTY COMMISSIONERS, 3; JUDGMENT, 2; MUNICIPAL CORPORATION, 2; PLEADING, 1; SUPREME COURT PRACTICE, 5.

1. *Appeal by One of Several Joint Judgment Defendants.—Necessary Parties Appellants.—Dismissal.*—Under section 635, R. S. 1881 (section 647, R. S. 1894), all joint judgment defendants, in order that they be bound by the result, must be joined in an appeal taken

- by one of the several judgment defendants as co-appellants; otherwise, upon motion of the judgment plaintiff, the appellee, the appeal will be dismissed. *Gregory v. Smith*, 48
2. *Dismissal.—Defect of Parties.—Jurisdiction.*—Where parties to the judgment appealed from have not been made parties to the appeal by the assignment of errors and service of notice, complete jurisdiction has not been conferred on the appellate tribunal, and the appeal will be dismissed. *Bozeman v. Cale*, 187
 3. *When Not Perfected.—Defect of Parties.*—Without notice to, or appearance by, all the parties to the judgment, the appeal remains unperfected, and all the parties to the judgment appealed from are not before the court; and the cause can not be heard on its merits. *Ib.*
 4. *Notice to Coparties.—Fixing Penalty of Bond and Naming Sureties in Term, but Filing in Vacation.*—Where at the time a judgment is rendered an appeal is prayed and granted upon the filing of a bond in a fixed sum, with named persons as sureties, within thirty days, and within that time, although the court is then in vacation, a bond is filed with the sureties and penalty as fixed by the court, the appeal so taken is a term time appeal, and no notice to the coparties not joining is necessary. *Thompson v. Connecticut Mut. Life Ins. Co.*, 325
 5. *Interlocutory Order.—Sustaining Demurrer to Evidence.—No Appeal from.*—The order of the trial court sustaining a demurrer to the evidence is a mere interlocutory order, and not a final judgment, and no appeal lies therefrom. *Thomas, Admr., v. Chicago, etc., R. W. Co.*, 462
 6. *Dismissal of.—Parties to Judgment or Proceeding not Parties to Appeal.—No Showing as to Absence of Interest of Omitted Parties.*—It is a rule of practice, which applies alike in civil and criminal cases, that the assignment of errors is the appellant's complaint on appeal, and that the burden rests upon him to present by it, in a comprehensive and intelligible manner, some ruling of the lower court claimed to be erroneous, and that the full names of the parties shall be stated; and this rule is not complied with without an affirmative showing as to the absence of interest in the appeal by those parties to the judgment or proceeding, who are not connected in the appeal, and under such state of the record the appeal will be dismissed. *State v. Hodgins*, 498
 7. *Dismissal of.—Defect of Parties Appellant.*—All parties entitled to appeal, *i. e.*, all parties against whom judgment is rendered, must be brought before the appellate tribunal as appellants in the same appeal, and notice served on them, or the appeal will be dismissed. *Benbow v. Garrard*, 571

APPELLATE COURT.

Jurisdiction.—Money Demand.—Transfer of Cause.—The jurisdiction on appeal of a money demand for less than \$3,500, is in the Appellate Court, and where, by mistake of the clerk, the case is docketed in the Supreme Court, the cause will be transferred to the proper court. *City of Huntington v. Burke*, 162

ASSESSMENTS.

See MUNICIPAL CORPORATION, 1, 2; NOTICE.

ASSIGNMENT.

See CORPORATION, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See JUDGMENT, 4.

ASSIGNMENT OF ERRORS.

Joint Assignment.—Individual Errors.—Where several parties assign errors jointly, they are not in a position to complain of an error as to them individually. *Bower v. Bowen, 31*

ATTACHMENT.

See JUDGMENT, 1.

BANKRUPTCY.

See JUDGMENT, 4.

BILL OF EXCEPTIONS.

See EVIDENCE, 5; REPORTER'S LONGHAND MANUSCRIPT.

1. *Time for.—Motion for New Trial.*—Where, on June 8, 1892, a motion for a new trial was filed and taken under advisement, and at the same time the court allowed of record one hundred and sixty days for the filing of a bill of exceptions, and on February 27, 1893, the motion for a new trial was overruled and the bill of exceptions filed, such bill is, under section 626, R. S. 1881, properly in the record. *Jones v. Casler, 382*
2. *Where Evidence not Properly in Record.*—Where what purports to be a bill of exceptions follows the longhand manuscript in the record, the bill being destitute of a proper caption, and nowhere refers to the longhand manuscript, and considered alone, does not show that an official reporter had been appointed, nor that there was a manuscript of the evidence in the cause, the evidence is not properly in the record. *City of Alexandria v. Cutler, 568*
3. *Failure to File With Clerk.—Not Properly in Record.*—If it does not appear that a bill of exceptions was filed with the clerk of the trial court, it is not properly in the record, and no question upon the evidence can be entertained. *Prather v. Prather, 570*

BOARD OF CHILDREN'S GUARDIANS.

1. *Collateral Attack.—Habeas Corpus.—Jurisdiction.*—In a proceeding for the custody of an infant child by the board of children's guardians, if the circuit court has jurisdiction over the subject and the parties, though it committed the greatest irregularities and errors, its judgment can not be collaterally impeached therefor by a habeas corpus proceeding. *Board of Childrens' Guardians, etc., v. Shutter, 268*
2. *Power of Court Over Infants, etc., to Appoint Guardians.—Statutory Authority.—Jurisdiction.*—The power conferred by statute upon the circuit courts to appoint guardians for infants, lunatics and idiots, is merely declaratory of the chancery powers they already possessed. *Ib.*
3. *Court.—Jurisdiction of Person of Infant.—Notice to Parents.*—In a proceeding by a board of children's guardians for the custody of a child thirteen years old, where notice of the proceeding has been duly given the father and mother of the child, the court has acquired jurisdiction of the infant without serving notice of the proceeding upon it, other than taking it into custody by the proper officer. *Ib.*
4. *Errors in Proceeding for Custody of Child.—Relief Against as in Other Proceedings.*—If errors are committed in a proceeding by such board for the custody of a child, relief therefrom must be

sought just as in any other proceeding—by appeal, bill of review, or any other method known to the law for relief against erroneous judgments. *Ib.*

BRIDGE.

1. *Defective.—Negligence.—Watercourse.—Stream.—Pleading.*—The mere allegation of the name of a stream will not supply an allegation that it is a watercourse, but an allegation that a bridge spanned a stream shows that it was over a watercourse.
Board, etc., v. Nichols, 611
2. *Complaint.—Motion to Make Specific.*—Where a complaint to recover for injuries caused by a defective bridge alleges that "the plaintiff and her husband were driving," a motion to make it more specific by alleging which one was driving will not lie. *Ib.*
3. *Location of Bridge.*—An allegation that the defective bridge constituted a part of a public highway "leading into the city of Seymour," and "at or near the city limits on the south of said city," shows that the bridge is not within the city. *Ib.*
4. *Maintenance of Bridge.—Duty of County.*—The fact that a bridge is within a township does not of itself exempt the county from its obligation to keep it safe, and an allegation that the bridge was constructed by the county shows that it is not a township bridge. *Ib.*
5. *Construction of Bridge.—Record of Not Essential to Liability.*—If a bridge is one which it is the statutory duty of the county to maintain, a breach of the duty, resulting in injury, renders the county liable without reference to when or by whom it was constructed, or whether there is a record of its construction. *Ib.*
6. *Use of Highway and Bridge in Night Time.—Contributory Negligence.*—One using care is not guilty of negligence in driving in the night time along a highway with which he is not familiar, and going upon a bridge which is a part thereof. *Ib.*
7. *Character of Injury.*—A complaint to recover damages for several specific personal injuries is not bad because a part of the injuries alleged could not have been caused by the defendant's negligence. *Ib.*
8. *Bridges Over Natural and Artificial Watercourses.*—The statutory duty of counties to maintain bridges is not limited but includes both natural and artificial watercourses. *Ib.*
9. *Filing Claim with Commissioners.—Proof of by Plaintiff not Necessary.*—One who sues a county for personal injuries is not bound to prove that the claim had been filed for allowance before the county commissioners prior to bringing the action. *Ib.*
10. *Size of Bridge.—County Liability not Determined by.*—The duty of a county in the maintenance of bridges is not determined by the length of the bridge, and proof that a bridge was one the chord of which was less than twenty-five feet is not in itself sufficient to exempt the county from liability. *Ib.*
11. *Construction of Bridge.—Part Payment by City.—Duty to Maintain.*—The fact alone that a city paid a part of the cost of building a bridge neither subjects it to city control nor diminishes the interest or duty of the county as to the bridge. *Ib.*

BURDEN OF PROOF.

See INSTRUCTIONS TO JURY, 1; FRAUDULENT CONVEYANCE, 5.

CANCELLATION OF INSTRUMENT.

1. *Promissory Note.—Mortgage.—Fraud.—Undue Influence.—Com-*

plaint.—Where a complaint, in an action to cancel and set aside a note and mortgage procured by fraud and undue influence, alleged, in substance, that the plaintiff was a feeble old man in ill health, of weak mind and in straitened circumstances, and that defendant, with full knowledge of all the facts, in bad faith, and for the fraudulent purpose of cheating and defrauding plaintiff, instituted an unfounded action against him for damages sustained in a real estate transaction between them, by reason of misrepresentations of the plaintiff; and that afterwards, by threats and undue influence, defendant intimidated plaintiff, and, on account of plaintiff's old age, ill health and weak mind, induced him to execute the note and mortgage for the fraudulent purpose aforesaid,—the complaint is sufficient on demurrer.

Tucker v. Roach, 275

2. *Consideration.*—*Compromise of Suit.*—*Fraud.*—*Intimidation.*—*Note.*—*Mortgage.*—Where the jury find for the plaintiff on such paragraph of complaint, the finding, in effect, was that the note and mortgage were without consideration, were procured by fraud and intimidation, and that the suit compromised was not a good cause of action, nor brought in good faith; and, therefore, the amount agreed upon in the compromise was not a sufficient consideration for the note and mortgage. *Ib.*
3. *Evidence.*—*Financial Condition.*—*Fraud.*—*Intimidation.*—*Mental and Physical Condition.*—In an action to cancel a note and mortgage alleged to have been procured by fraud and intimidation, the fact that the plaintiff was, at the time of their execution, in straitened circumstances, added to old age and feebleness of mind and body, is certainly an element that may be taken into consideration in determining whether he was overreached in a fraudulent contract. *Ib.*

CASES.

Carmikel v. Cox, 58 Ind. 133, Distinguished. See *Ferris v. Udell*, 579.
City of Vincennes v. Windman, 72 Ind. 218, Distinguished. See *Huford v. Conover*, 151.

Wray v. Hill, 85 Ind. 546, and decisions following, Modified. See *Thompson v. Connecticut Mut. Life Ins. Co.*, 325.

CHARACTER EVIDENCE.

See EVIDENCE, 3.

CHILDLESS SECOND WIFE, ESTATE OF.

See REAL ESTATE, 1.

CIRCUIT COURT.

See SUPERIOR COURT.

CITY.

See BRIDGE, 11; INJUNCTION, 2; MUNICIPAL CORPORATION, 4, 5;
 STATUTE, 2.

COLLATERAL ATTACK.

See BOARD OF CHILDREN'S GUARDIANS, 1; JUDGMENT, 4; QUIETING TITLE, 3; VARIANCE.

COMPLAINT.

See ACTION, 5; BRIDGE, 2; CANCELLATION OF INSTRUMENT, 1; CONTRIBUTORY NEGLIGENCE, 3; CROSS-COMPLAINT; HARMLESS ERROR, 1; NEGLIGENCE, 2, 3; PARTIES, 1, 2; PLEADING, 1; QUIETING TITLE, 5; REAL ESTATE, 3; WILL, 8, 9, 10.

COMPROMISE.

See CANCELLATION OF INSTRUMENT, 2.

CONCLUSION OF LAW.

See SPECIAL FINDING, 6.

CONSIDERATION.

See CANCELLATION OF INSTRUMENT, 2; CONTRACT, 2; TRUST, 4.

CONSPIRACY.

See CORPORATION, 1.

CONSTITUTIONAL LAW.

See TAXES, 1.

When Such Question Will Not Be Decided.—Supreme Court Practice.—The appellate tribunal will not decide a constitutional question when such decision is not absolutely necessary to a disposition of the cause upon its merits. *State v. Atkinson, 426*

CONTRACT.

See CORPORATION, 4, 5, 6; INJUNCTION, 2; INTOXICATING LIQUORS, 9; MUNICIPAL CORPORATION, 6; REAL ESTATE, 4, 5; WILL, 7.

1. *Written.—Parol Verification.—Oral Agreements Performed Subsequent to Making Written Contract.—Subsequent Agreements.—Promissory Note.*—The rule that the terms of a written contract (in this case a promissory note) can not be varied by parol, does not exclude oral agreements made and performed subsequent to the execution of the written contract; and prior or contemporaneous agreements fully executed after the making of the written contract become, by their fulfillment, subsequent agreements.

Collins v. Stanfield, 184

2. *Parent and Child.—Advancement in Full Consideration of Child's Expectant Interest in His Ancestor's Estate.*—Where the father makes a contract with certain of his children, who are his expectant heirs, all of full age, by the terms of which they are to receive a present allowance, in land, by way of advancement, in full for all their expectant interest in his estate, and agree to release the estate of all claims thereafter on his death and the final settlement and distribution of the estate, such contract, or family settlement, if made freely and without fraud, is binding and valid upon all parties concerned. *Brown v. Brown, 653*

3. *Family Settlement.—Answer Setting Up Such Settlement.—Sufficiency of Reply to.—Equitable Relief.*—Where the reply to an answer setting up such contract, stated that at the time of the contract and deed the second wife, now widow, of the ancestor had a great dislike for plaintiffs, children of a former wife, and a strong and undue influence over said ancestor, and was using every persuasive means in her power to induce him to will all his property to her and her children, and cut plaintiffs out entirely, and that the contract and deed were made under the above circumstances and surroundings, by reason of which facts plaintiffs aver that by said advancements they received but a small portion of their father's estate,—it presents a case which appeals so strongly to equity that the issues as to the freedom and fairness of the contract between the father and his children by his first wife ought to be determined by the court after hearing the evidence, and not upon demurrer. *Id.*

CONTRIBUTION.

See LIEN.

CONTRIBUTORY NEGLIGENCE.

See BRIDGE, 6; MASTER AND SERVANT, 7; NEGLIGENCE, 1, 3, 5; RAILROAD, 3.

1. *Natural Gas.—Pipe Line.—Explosion.—Highway.*—Where it appears that at the time the accident occurred, the plaintiff, a boy eighteen years of age, was passing by the crossing of the highways and stopped to look at the burning gas escaping from defendants' pipe line in the highway, unaware of his danger, and that without any act or suggestion of his, but solely by the act of another, and because of the negligence of defendants, the gas exploded, causing plaintiff's injury, the plaintiff was not guilty of contributory negligence. *Lebanon, etc., Co v. Leap, 443*
2. *Erroneous Instruction.—Natural Gas.—Explosion.—Plaintiff's Intermeddling at Previous Times.*—Where, in such case, the court instructed the jury that "Anything any other person may have done then and there, or at any other time, independently of himself, and for which he (the plaintiff) was not responsible, or anything he may have done himself at any other time or place in way of intermeddling with any of the gas wells or pipe lines of said defendants, or either of them, if either of such acts have been proven, would not affect the right of the plaintiff to recover,"—the instruction is too broad, the effect of the instruction being to exclude from the consideration of the jury all former acts of the plaintiff in connection with the wells or the pipe line, and confine their attention strictly to his actions at the time and place of the accident, and was, therefore, erroneous. *Id.*
3. *Boy Twelve Years of Age.—When Tenderness of Years and Incapacity are not in Issue.—Complaint.—Theory of.*—A boy twelve years of age may, through tenderness of years and want of capacity, be tempted by treacherous objects thrust in his way by the carelessness of others, and be incapable of discerning the presence of danger such as that to which the injured party was here exposed, viz., a gas pipe loose in the highway, poorly jointed and subject to a high pressure of gas, which was escaping and burning several feet high in the presence of the plaintiff. The allegations of the complaint, however, should, in such cases, be such as to make tenderness of years and want of capacity issues in the case, and these allegations should be supported by the evidence. The mere statement that plaintiff was twelve years of age is not sufficient, especially where there are allegations as to his superior intelligence and other endowments, so strongly set forth as to make the complaint substantially the same as it would be in case of an adult. *Lebanon, etc., Co. v. Griffin, 476*
4. *Instructions to Jury.—Not Relevant to Issues.—Incapacity and Tenderness of Years.*—In such case, it was error to instruct the jury, in relation to plaintiff's contributory negligence, as if the tenderness of years and the incapacity of the plaintiff were in issue, when, in fact, they were not. *Id.*
5. *Negation of.—Special Averments of Facts.*—A general allegation that the plaintiff was free from negligence contributing to the injury sued for, is not overcome by specific averments of facts unless they show that he knew, or had opportunity to know, of the danger. *Salem Stone and Lime Co. v. Griffin, 141*

CONVEYANCE.

See AGENCY; DEED, 1; FRAUDULENT CONVEYANCE; REAL ESTATE, 1, 4, 5, 7, 8; SALE, 1, 2, 4; TRUST, 4.

1. *Of Expectancy or Remainder.—Constructive Fraud.*—Where an orphaned infant, being the actual owner of a part of a tract of land and the owner of the other part subject only to a life estate, the whole being worth three thousand dollars, is kept in ignorance of his actual legal rights by interested relatives, with whom he makes his home, and is induced, immediately after arriving at legal age, to execute a deed to the whole tract for five hundred dollars, there is such constructive fraud as entitles him to have the deed set aside. *Chambers v. Chambers, 111*
 2. *Statute of Limitations.—Remainderman.—Life Tenancy.*—The statute of limitations does not begin to run against a remainderman during the life tenancy. *Ib.*
 3. *Construction of Deed.—Vested Remainder.—Postponement of Possession.*—A warranty deed conveying land to A for life, then to go in fee-simple to B in the event that he lives to be twenty-one years old, vests the remainder in B but postpones the possession. *Ib.*
 4. *Sale of Remainder.—Adequacy of Price.—Life Estate not Considered.—Public Policy.*—In determining adequacy of the price paid to a remainderman, the life estate can not be taken into account, as the law, by reason of public policy, requires that the full market value be paid. *Ib.*
 5. *Relief from Fraud.—Limitation of Action.*—Upon a conveyance of land held in fee-simple the statute of limitations begins to run when the deed is delivered, and relief from fraud practiced in procuring the conveyance must be sought within six years. *Ib.*
 6. *By Cotenant of a Several Part Without Partition.*—A cotenant can not, by his own deed, and without the co-operation of the other cotenants, select and dispose of his several interest in the common property, even though the part attempted to be conveyed is only equal in value to his share. *Warthen v. Siefert, 233*
 7. *Title Taken by Grantee of Cotenant.—Life Estate.—Remainder.*—Where the owner of a life estate in land acquires by deeds from remaindermen title in fee-simple to an undivided two-fifths thereof, a conveyance by him, prior to partition, of a definite part of the land, actually equal in value to two-fifths of the whole tract, carries to the grantee only the life estate in such part and the undivided two-fifths of the fee-simple thereof. *Ib.*
 8. *Partition.—Title.*—C., by devise from her father, owned for life forty acres of land with remainder over to her five children. Two of the children, A. and G., each sold an undivided fifth to the mother. Afterwards the mother conveyed to her daughter, A., and the latter's two children, ten acres off the west side of the tract, and shortly afterward conveyed to the same grantees six acres more but not naming any particular part of the tract. In partition proceedings brought by these grantees they were found to be the owners of sixteen acres off the west side, and the same was sold by commissioners, C. being the purchaser. C. then sold the sixteen acres to W.
- Held*, that the interest acquired by C. at this sale was only such as she had power to previously convey, viz., her life estate and undivided two-fifths interest in the sixteen acres, and that the conveyance to W. carried no more. *Ib.*

CONVEYANCE PENDENTE LITE.

See PURCHASER PENDENTE LITE; QUIETING TITLE, 2.

CORPORATION.

See STATUTE OF LIMITATIONS, 6.

1. *Conspiracy.—Fraudulent Increase of Stock.—Damages.*—A corporation may become a party to or participator in a conspiracy to increase its capital stock for a fraudulent purpose, and will be liable for damages resulting therefrom.
Dorsey Machine Co. v. McCaffrey, 545
2. *Stockholders.—All Need not Participate in Fraud in Order to Bind Corporation.*—It is not essential to bind the corporation for wrongs resulting from a fraudulent increase of its capital stock that all of its stockholders should participate in the act, but it is sufficient if enough engage therein to bring about the increase under the requirements of the law. *Ib.*
3. *Purchase of Stock.—Fraudulent Representations by President as to Value.—Damages.—Assignment.—Parties.*—Where one is induced to purchase stock in a corporation by the false and fraudulent representations of its president as to the value of the stock and the solvency of the corporation, and the corporation receives and uses the proceeds of the sale, the latter is liable for the damages thereby sustained, without reference to the manner in which the stock was issued, and a complaint to recover such damages will lie, although the corporation is insolvent and is being wound up under a statutory assignment, and in such case the assignee is a proper but not a necessary party. *Ib.*
4. *Promoters' Contract.—Ratification of.*—A contract made by the promoters of a corporation previous to its organization, and ratified and confirmed by it afterwards, is binding upon the corporation. *Bruner, Receiver, etc., v. Brown, 600*
5. *Contracts with Promoters.—Payment of Promoter's Services.—Purchase of Property from.*—A corporation has the right to make contracts with its promoters to pay them for their services and to purchase property from them. *Ib.*
6. *Contract.—Construction of Waterworks in Consideration of Stock and Bonds.—Value of Stock.—Action by Receiver.—Fraud.*—Where a contract is entered into between a waterworks company, which at the time has no indebtedness, and another, whereby the latter, in consideration of the construction of the waterworks plant, receives a certain amount in bonds and a certain amount in paid up stock, and a statement is filed in the county clerk's office showing that the stock is paid up by the execution of the contract for the construction of the works, in pursuance of section 3861, R. S. 1881, thereby giving notice to all concerned, a receiver of the corporation, suing for the benefit of creditors, can not recover from a holder the value of the stock unless the fact of fraud in the transaction is proved and found. *Ib.*

COTENANT.

See CONVEYANCE, 6.

COUNTY.

See BRIDGE, 4.

COUNTY COMMISSIONERS.

See BRIDGE, 9; WILL, 1.

1. *Dismissal of County School Superintendent.—Jurisdiction at Special Term.—Case Distinguished.*—The board of county commissioners

has jurisdiction to hear and determine a petition for the dismissal of a county superintendent of schools for immoral conduct and neglect of duty, at a special session of such board. *City of Vincennes v. Windman*, 72 Ind. 218, distinguished.

Hufford v. Conover, 151

2. *Commissioners' Court.—Have Only Statutory Power.—Void Act.—Attempt to Change or Vacate Judgment.*—The board of county commissioners has no power other than that conferred upon them by statute. Such board has no statutory power to change, vacate, or disregard its order or judgment after it has been made and recorded, and an act of the board in attempting to do so is void; the only remedy of an aggrieved party, in such case, is by appeal.

Badger v. Merry, 631

3. *Appeal.—Dismissal of.—Harmless Error.—Void Orders.*—Where an appeal is taken from the order of the board setting aside all its other orders made after the final order or judgment has been made and entered, a dismissal of the appeal can not harm appellant, for the appellant could have no other purpose in the appeal than to reinstate the void proceedings had since the rendition of the final judgment. *Id.*

COUNTY SUPERINTENDENT OF SCHOOLS.

See COUNTY COMMISSIONERS, 1.

COURT RULES.

See PRACTICE, 1.

CRIMINAL LAW.

1. *Uttering Forged Instrument.—Indictment.—Guilty Knowledge.*—"Knowingly."—In an indictment for forgery the phrase, "did * * knowingly utter, publish and pass * * as true and genuine, a certain false, forged and counterfeit promissory note," etc., sufficiently avers the guilty knowledge that the instrument was forged. *State v. Williams*, 43
2. *Sale of Intoxicating Liquors.—Legal Holidays.—Thirtieth Day of May.—Statute Construed.*—The 30th day of May is not a legal holiday within the meaning of section 2098, R. S. 1881, making it unlawful to sell intoxicating liquor on certain days. It is not a general legal holiday, but is simply a legal holiday in relation to commercial paper, and for no other purpose. *State v. Atkinson*, 426
3. *Consideration of Evidence on Appeal.*—It is only where there is an absolute failure of the evidence to sustain the finding or verdict on some material point that the Supreme Court will interfere on that ground alone. *Felton v. State*, 531
4. *Rape.—Consent.—Subjection of Will.—Outcry.—Physical Resistance.*—Where a woman alights from a train at three o'clock in the morning, at a railroad station, and being compelled to wait some time for a train upon another road which will take her to her destination, inquires of a stranger for a hotel, who recommends one, and another stranger, the defendant, who is the driver of the only vehicle then at the station, overhearing the conversation, offers to take her to the hotel in his vehicle, which contains two other men, also strangers to her, and such defendant, after she enters his vehicle, instead of taking her to the hotel, fraudulently drives out of the town into a ravine in the woods, subjecting her to indignities on the way and causing her to fear for her life, at which she cries and begs to be let go, and in the ravine the defendant commands her to dismount and by force lays her

upon the ground and has intercourse with her, against her will, after which, upon her attempting to arise, he profanely commands her to lay still and let the other men have intercourse with her, and she is then taken to a lumber yard and deserted, the defendant is guilty of rape, without proof of outcry or physical resistance. *Ib.*

5. *Rape.—Instruction.—Overpowering Mind.*—An instruction that "consent, induced by fear of personal violence, is no consent, and though a man lay no hands on a woman, yet, if by an array of physical force he so overpowers her mind that she does not resist, he is guilty of rape by having the unlawful intercourse," is not erroneous. *Ib.*
6. *Rape.—Consent.—Force.—Fear.—Instructions.*—For other instructions given and refused, involving the matters of force, fear and consent, see the opinion. *Ib.*
7. *Failure of Defendant to Testify.—Instruction Upon Must be Requested.*—The failure of the court to instruct the jury regarding their duty in a case where the defendant does not testify, is not error unless the defendant requests such an instruction. *Ib.*

CROSS-COMPLAINT.

See PROCESS; REAL ESTATE, 2.

DAMAGES.

See CORPORATION, 1, 3; HIGHWAY, 5; NEGLIGENCE, 1; RAILROAD, 10; WAY BY NECESSITY.

What Damages Not Excessive.—A recovery of nine thousand four hundred dollars for the wrongful killing of an industrious and frugal farmer, in good health, with an expectancy of thirty-eight years, who leaves surviving a wife and infant child, can not, on appeal, be said to be excessive.

Pittsburgh, etc., R. W. Co. v. Burton, Admr., 357

DEBTOR AND CREDITOR.

See HUSBAND AND WIFE.

DECEDENTS' ESTATES.

See LIEN.

1. *Election by Widow.—When Properly Made.*—Where a widow does everything required of her by the law, and within the required time, the election is properly made. *Bower v. Boreen, 31*
2. *Election by Widow.—Need not be Made Exhibit in Action for Partition.*—The election, or a copy thereof, need not be made a part of the complaint in an action by the widow for partition, where the election is but evidence of ownership and not the basis of the action. *Ib.*

DEED.

See AGENCY; CONVEYANCE, 3; QUIETING TITLE, 6, 7; REAL ESTATE, 7, 8; REFORMATION OF INSTRUMENT, 1, 2, 3; SALE, 3, 4; SUPERIOR COURT; TITLE, 2, 3.

1. *Conveyance.—Joint Tenancy.—Real Estate.*—Where the premises and the habendum of a deed are, that B. W. and R. W. of Hamilton county, and State of Indiana, convey and warrant to L. R. and J. R., jointly, of Hamilton county, in the State of Indiana, etc., the word "jointly" creates in the grantees a joint tenancy. *Case v. Owen, 22*
2. *Character of Estate Conveyed.—Estoppel.*—A deed of release, or quitclaim, or a conveyance of the right, title and interest of the

grantor, even though it be with full covenants of warranty, without designating in the instrument any particular estate, operates simply to transfer the present interest of the grantor; but where a deed containing covenants of warranty bears upon its face evidence that the grantor intended to convey an estate of a particular description or quality, then, even though the covenants be technically imperfect, the grantor and those claiming through him will be bound in respect to the estate described, to the extent at least of being estopped to deny that the grantor was seized of such estate at the time of the conveyance.

Stephenson v. Boody, 60

DEFAULT.

See PRACTICE, 1.

DEFENSE.

See LIBEL; MARRIED WOMAN, 2.

DELIVERY.

See REAL ESTATE, 4.

DEMAND.

See MANDAMUS.

DEMURRER.

See HARMLESS ERROR, 2; PLEADING, 2; QUIETING TITLE, 5; STATUTE OF LIMITATIONS, 5.

DEMURRER TO EVIDENCE.

See APPEAL, 5.

DESCRIPTION.

See NUISANCE, 2; PARTIES, 2; REAL ESTATE, 5; REFORMATION OF INSTRUMENT, 1, 2; STATUTE OF LIMITATIONS, 1.

Real Estate.—A description of real estate that may be rendered certain by averment is not void for uncertainty.

Mettart v. Allen, 644

DISCRETION.

See JURY, 2; WILL, 2.

DIVORCE.

See JUDGMENT, 1.

DRAINAGE.

See MANDAMUS.

EASEMENT.

See REAL ESTATE, 7; STATUTE OF LIMITATIONS, 3.

ELECTION BY HUSBAND.

See WILL, 7.

ELECTION BY WIDOW.

See DECEDENTS' ESTATE, 1, 2; ESTOPPEL, 1, 2.

EQUITY.

See ACTION, 3.

EQUITABLE RELIEF.

See ACTION, 4; CONTRACT, 3; QUIETING TITLE, 4; TITLE, 4.

ESTOPPEL.

See ACCIDENT INSURANCE, 2; DEED, 2; REAL ESTATE, 8.

1. *Will.—Election by Widow.—Partition.*—It is no ground of objection in an action for partition by the widow, who has chosen to take under the law, that she was present when the will was executed, and made no objection to it. *Bower v. Bowen, 31*
2. *Will.—Election by Widow.*—A widow who has expressed herself as satisfied with the provisions of her deceased husband's will is not estopped to take under the law on discovering what her legal rights are, if she acts in the time allowed by statute. *Id.*

EVIDENCE.

See CANCELLATION OF INSTRUMENT, 3; CRIMINAL LAW, 3; LIBEL; MASTER AND SERVANT, 3; SUPREME COURT PRACTICE, 1, 3; WILL, 9.

1. *Irrelevancy.—Rejection.*—There can be no error in rejecting evidence which is irrelevant to the issues. *Sharpe, Admz., v. Commercial, etc., Acc. Ass'n of America, 92*
2. *Res Gestæ.—Declarations.—Personal Property.—Possession.—Title.*—Declarations of one in possession of property and claiming the title, that she is the owner thereof, are admissible in evidence as a part of the *res gestæ*, in an action involving the question of title thereto. *Garr, Scott & Co. v. Shaffer, 191*
3. *Consolidated Actions.—Ownership.—Declarations.—When Original Evidence.—Character Evidence.*—Where several cases to foreclose a chattel mortgage and for the recovery of personal property have been consolidated, evidence as to statements by a party to one of the possessory actions, as to ownership, out of court, in contradiction to her statements as a witness in court, would be original evidence against her as a party; and as to those cases to which she was not a party, her statements as to ownership would not be binding and are inadmissible; and as evidence of such declarations made out of court was not impeaching, it would be error to allow character evidence to be introduced in her favor. *Id.*
4. *Document.—Fraudulent Destruction.—Search.*—Where the theory of a case is that a document was fraudulently destroyed, proof of a search and failure to find the document is not required. *Jones v. Casler, 382*
5. *When not in Record.—Reporter's Longhand Manuscript.—Filing.—Bill of Exceptions.*—Where it appears from the clerk's certificate that the reporter's longhand manuscript is included in the transcript, but that it was not filed, and was not included in a bill of exceptions, the evidence is not in the record. *Hughes v. Hughes, 474*
6. *Personal Injuries.—Declarations of Pain.*—Declarations of pain and suffering by an injured person after the injury is sustained and up to the time of bringing an action therefor, are competent evidence. *Board, etc., v. Nichols, 611*

EXEMPTION FROM EXECUTION.

See FRAUDULENT CONVEYANCE, 2.

EXPECTANCY.

See CONVEYANCE, 1.

FAMILY SETTLEMENT.

See CONTRACT, 3.

FEE.

See SALE, 1, 2.

FEE, CONDITIONAL.

See SALE, 5.

FELLOW-SERVANT.

See NEGLIGENCE, 4.

FORMER ADJUDICATION.

See JUDGMENT, 4; RES ADJUDICATA.

FRAUD.

See CANCELLATION OF INSTRUMENT, 1, 2, 3; CONVEYANCE, 1, 5; CORPORATION, 1, 2, 3, 6; EVIDENCE, 4; FRAUDULENT CONVEYANCE, 3; STATUTE OF LIMITATIONS, 4, 6.

FRAUDULENT CONVEYANCE.

1. *Property Sufficient From Which Debts May be Enforced at Time of Conveyance.*—If, at the time a conveyance is made by a debtor, he retain property sufficient to pay his debts, and from which the debts may be enforced, upon execution, his conveyance is not fraudulent as to creditors, and his subsequent insolvency would not cause such conveyance to be set aside. *Emerson v. Opp*, 27
2. *Husband and Wife Joining in Conveyance of Husband's Lands for the Purpose of Retaking it as Tenants by Entireties.—Exemption from Execution.*—Where A, his wife joining him, conveys land held by him in fee simple to B, without consideration, who, according to agreement, immediately reconveys the same to A and wife as tenants by entireties, A not having property left, over and above his legal exemptions, to pay his unsecured debts, such conveyance was fraudulent as against such debtors, and may be set aside. *Phillips v. Kennedy*, 419
3. *Special Finding.—Fraud as an Ultimate Fact.—Recovery.*—In an action to set aside a fraudulent conveyance, where the facts are specially found, there can be no recovery in the absence of a finding of fraud as an ultimate fact. *Id.*
4. *Preference of Creditors.—Sons Preferring Father.*—Where there is a *bona fide* preference of creditors by a failing firm, the fact that the creditor preferred was the father of the debtors does not of itself render payment to him fraudulent. *Rockland Co. v. Summerville*, 695
5. *Burden of Proof.*—The fact that the grantee was the father of the debtors does not shift the burden of proof from those alleging fraud, and require the grantors and grantee to show the good faith of the transaction. *Id.*

GAS.

See NATURAL GAS.

GRAVEL ROAD.

Sufficiency of Petition.—Part of Road Over Route where no Highway Previously Existed.—No Power in Such Proceeding to Locate and Establish Highway.—Where a petition for the establishment of a free gravel road shows on its face that one mile of the proposed improvement is to be over a route where no highway exists, but that it will connect with and join two existing highways, both of which are included in the petition, but it is not shown in the report, nor does it appear in the order of the board of commissioners establishing the improvement neither is it found by the decree of the circuit court, that this mile of road is laid upon new ground for the purpose of straightening any public highway,

nor that better drainage will be secured thereby, nor that any route of travel for the public will be shortened, nor that there will be any road changed, improved or affected by this particular mile of improvement,—the petition did not state facts sufficient, and the court acquired no jurisdiction over the subject-matter of the proceeding. The board of county commissioners has no power, under the statute, to construct a gravel road over a route where no highway previously existed, except for shortening, straightening, etc., as above stated. *Crow v. Judy*, 562

GUARANTY.

1. *When a Continuing One.*—G. and P. entered into the following guaranty: "We hereby jointly and severally guarantee to the Presbyterian Board of Publication payment for all sales which may be made by them to Rev. William A. Patton, but our liability on this guaranty not to exceed, in any event, \$3,000." *Held*, that the guaranty is a continuing one.
Trustees of the Presbyterian Board, etc., v. Gilliford, 524
2. *A Continuing One.—Limited Liability.*—A guaranty of payment for goods to be sold from time to time to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it; it being the extent of liability and not the extent of sales that is limited. Where the amount of the guarantor's liability is limited and the time is not, it will be held to be a continuing guaranty. *Ib.*
3. *Additional Security.*—The fact that the obligee took additional security from the obligor did not lessen the obligation of the grantors. *Ib.*

HABEAS CORPUS.

See BOARD OF CHILDREN'S GUARDIANS, 1.

HARMLESS ERROR.

See COUNTY COMMISSIONERS, 3; SUPREME COURT PRACTICE, 6.

1. *Finding for Plaintiff on Paragraph of Complaint.*—*Errors Relating Thereto.*—Where the finding is for the plaintiff, as to a paragraph of complaint, all decisions in relation to such paragraph, whether relating to the pleadings, evidence or instructions, if erroneous, were harmless as to him. *Tucker v. Roach*, 275
2. *Overruling Demurrer to Paragraph of Answer.*—*Trial and Finding on Another Paragraph.*—The overruling of a demurrer to a second paragraph of answer, if error, was harmless where the trial and the special finding in favor of the defendants were upon the first paragraph of answer. *Miller v. McDonald*, 465

HEIRS.

See CONTRACT, 2.

HIGHWAY.

See BRIDGE, 6; CONTRIBUTORY NEGLIGENCE, 1; GRAVEL ROAD; NEGLIGENCE, 6; STREETS AND ALLEYS.

1. *Proceeding to Locate and Open.*—*Remonstrance.*—*Nature and Effect of.*—A remonstrance in a proceeding to locate and open a highway is in the nature of an answer to the petition, and raises the issue to be disposed of before the county board, and upon appeal to the circuit court. *Bronnenburg v. O'Bryant*, 17
2. *Amendment of Petition.*—*When Properly Made.*—*Presumption.*—After the proceedings have been instituted, and before the ques-

tion of jurisdiction is determined, it is clearly within the discretion of the board to permit an amendment of the petition, and where the contrary is not made to appear, it will be presumed that the amendment was properly made. *Ib.*

3. *Viewers.—Appointment.—Oath.—Inference.*—Where it appears that viewers were appointed, and their report shows that they were sworn, it will be inferred that they were sworn to do the thing they were appointed to do. *Ib.*
4. *Viewers.—Report by Two.*—A report by two viewers is sufficient. *Ib.*
5. *Locating and Opening.—Affecting Two Counties.—Damages, How Paid.*—In a proceeding to locate and open a highway in two counties, the damages declared assessed shall be paid equally by both counties. *Ib.*

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCE, 2; MORTGAGE, 2; WILL, 7.

Wife Purchasing Real Estate and Taking Title in Husband's Name.—Suretyship of Wife.—Debtor and Creditor.—Where a married woman bought real estate, giving her note, secured by mortgage thereon, in part payment of the purchase-price, and took the title in the name of her husband, the relation of debtor and creditor was not created between the husband and vendor, and consequently the wife could not occupy the position of surety for her husband. *Collins v. Stanfield, 184*

INCUMBRANCES.

See LIEN; TITLE, 5.

INDICTMENT.

See CRIMINAL LAW, 1.

INJUNCTION.

See MARRIED WOMAN, 8; MUNICIPAL CORPORATION, 2; RAILROAD, 8, 10.

1. *Right of Street Railroad to Cross Steam Railroad at Street Crossing.—Street Railroad's Right Founded on Public Easement.—Subject to no Conditions Other than those Placed on the General Public.*—Since it is the settled law of this State that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street railway company's right to use the street is founded on that easement, it must be held that the right of a street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. Hence, it is not error to enjoin a steam railway company from interfering with a street railway company where the latter is proceeding to construct a proper crossing at its own expense. And the same principle applies where the crossing is in a public highway not a street. *Chicago, etc., R. W. Co. v. Whiting, etc., R. W. Co., 297*
2. *Contract.—City.—Right to Substitute Electric for Gas Lights.—Indefinite Terms.*—Where a contract between a city and a gas company for lighting the city streets for a term of twenty-three years provides that if, at any time thereafter the city shall determine that electric lights shall be substituted for gas lights the gas company "shall make the substitution of such electric lights instead of as many street lamps as may be agreed upon between the city and the company (the price at which said electric lights shall be furnished to be fixed by an equitable agreement between the

city and the company,") such contract is not sufficiently certain to be specifically enforced, and if the city determines to substitute electric lighting prior to the expiration of the contract, injunction will not lie, at the suit of the gas company, to restrain the city from proceeding to secure such lighting by competitive bids.

Gas Light, etc., v. City of New Albany, 660

3. *Adequate Remedy at Law.*—When an injury may be fully compensated in an action at law for damages where the wrongdoer is solvent, the extraordinary remedy of injunction will not lie. *Ib.*

INSANITY.

See UNSOUNDNESS OF MIND.

INSTRUCTION TO FIND FOR PARTY.

See ACCIDENT INSURANCE, 1.

INSTRUCTIONS TO JURY.

See CONTRIBUTORY NEGLIGENCE, 2, 4; CRIMINAL LAW, 5, 6, 7; INTOXICATING LIQUORS, 7; MASTER AND SERVANT, 4; SPECIAL VERDICT, 1, 2, 3, 4.

1. *Burden of Proof.*—An instruction that the plaintiff "in a civil case, where he has established his complaint, that is, the vital, material facts set out in the complaint, should recover," is not harmful if, considered in connection with other instructions, the case is properly given to the jury.

Salem Stone and Lime Co. v. Griffin, 141

2. *Intoxicating Liquors.*—*Application for License to Sell.*—*Duty of Jury.*—"Lobby."—In a case involving the fitness of an applicant for liquor license, the court refused the following instruction: "In passing upon this case, you will be governed by the law and the evidence, and it is your duty not to allow yourselves to be influenced by the presence of a lobby in the court room opposed to the granting of the plaintiff's petition."

Held, that in so far as the instruction informed the jury that they should decide the case according to the law and the evidence, free from passion or prejudice, and without being influenced by public sentiment or popular clamor, it was correct; but in so far as it characterized the people in attendance upon court as a lobby who had packed the court room with intent to influence the jury to decide the case without regard to the evidence, the instruction was objectionable, as being itself calculated to prejudice the jury against the remonstrants.

Lynch v. Bates, 206

3. *Credibility of Witnesses.*—*Stated Generally.*—Where, in instructing the jury, the credit that ought to be given to witnesses is stated generally, without making particular allusion to any witness or class of witnesses in the case, there can be no well founded objection thereto. *Ib.*
4. *"Should" and "May."*—*Province of Jury.*—In such case, the matter predicated should be introduced by the word "may" instead of "should," as the word "should" in that connection seems, in a measure, to invade the province of the jury. *Ib.*
5. *Invasion of Jury's Province.*—An instruction that "when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior; and, also, to those who swear affirmatively to a fact, rather than to those who swear negatively, or to a want of knowledge or a want of recollection," is bad as invading the province of the jury.

Jones v. Casler, 382

6. *Refusal to Give.*—*When not Available Error.*—Unless the record shows that it contains all of the instructions given no available error can be based on the court's refusal to give instructions asked. *Board, etc., v. Nichols, 611*

INSURANCE.

See ACCIDENT INSURANCE; PARTIES, 1.

INTERLOCUTORY ORDER.

See APPEAL, 5.

INTERROGATORIES TO JURY.

- Untrue Answers.*—*Remedy.*—That answers to interrogatories are untrue or not supported by the evidence is no reason for returning them to the jury for further answers, but such fact can only be taken advantage of by a motion for a new trial, made in determining whether the general verdict is supported by the evidence. *Board, etc., v. Nichols, 611*

INTIMIDATION.

See CANCELLATION OF INSTRUMENT, 2, 3.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 2; INSTRUCTIONS TO JURY, 2.

1. *License.*—*Remonstrance by Nonresidents of Township.*—*Striking Out.*—While the statute (section 5314, R. S. 1881), authorizes only voters of the township wherein it is proposed to sell intoxicating liquors to remonstrate against the granting of a license, yet the refusal to strike out a remonstrance filed by voters of another township is harmless if a proper remonstrance, specifying the same grounds, is filed and prosecuted to the end. *Fletcher v. Crist, 121*
2. *Query*, whether, upon an application for license to sell intoxicating liquors in a town situated partly in three townships, and the giving notice to the citizens of the three townships, any citizens may remonstrate except those residing in the township in which the proposed place of sale is situate? *Ib.*
3. *Sufficiency of Remonstrance.*—*How Tested.*—The sufficiency of the facts stated in a remonstrance against the granting of a license to retail intoxicating liquors may be tested by demurrer, but not by a motion to strike out parts thereof. *Ib.*
4. *Motion to Strike Out Separate Specifications.*—The overruling of a motion to strike out separate specifications in a remonstrance is not available error. *Ib.*
5. *Juror.*—*Disqualifying Opinion.*—*Challenge.*—One who, upon his *voir dire*, says that he has a strong prejudice against saloons, which, however, he thinks he can lay aside; that he hardly believes a man can be moral and sell liquor, and that he is opposed to granting license to any person to sell liquor under any circumstances, is not competent to sit as a juror upon the trial of an application for license to sell intoxicating liquors, and an error in overruling a challenge for cause is not cured by a peremptory challenge. *Ib.*
6. *Partial Juror.*—One who upon his *voir dire*, in such a case, says that he thinks it is evidence of immorality for a man to engage in the sale of intoxicating liquors, is not impartial, and a challenge for cause should be allowed. *Ib.*

7. *License to Sell.—Fitness of Applicant.—Instruction to Jury.—Intoxication.—Law and Fact.*—Where, in an application for license to sell intoxicating liquors, the court instructed the jury, in substance, that if they find that the petitioner has been intoxicated in a public place, they should refuse him a license, is erroneous. From the fact that it is a misdemeanor, subject to a fine, for a person, even on one occasion, to become intoxicated in a public place, it does not follow, as a matter of law, that such a person is disqualified, under the law, to obtain a license.

Lynch v. Bates, 206

8. *Judgment Correct Upon Merits of Case.—Reversible Error.*—That there was evidence tending to support certain other charges of immorality and unfitness on the part of the applicant, can not avail to satisfy the mind of the court that the verdict of the jury was based upon such charges and evidence, and the court can not say that the judgment is right upon the merits of the case, the evidence not all being in the record, and the facts not being fully found. *Id.*

9. *Sale to a Woman for Retail Purposes.—Agent.—Contract for Purchase-money Unenforceable.—Public Policy.*—H., a woman, who was the owner of saloon fixtures and stock, executed a written contract with D., by the terms of which it was agreed that D. should apply in his own name and procure a license from the board of commissioners to sell intoxicating liquors, using H.'s fixtures, etc., and that when the license was procured, D. would retail the liquors for a salary of \$45 a month, which H. agreed to pay, and that after the current expenses are paid from the receipts the overplus was to go to H. W. supplied liquors to be sold in the saloon, which was charged to "D.— for H.—."

Held, that as W. sold the liquor to H.'s agent, knowing the capacity in which he acted, and the use to be made of it (such use being against the express provisions of the statute, and contrary to public policy), the law will not aid W. to enforce his contract of sale, but will leave the parties in the situation in which they have placed themselves. *Woodford v. Hamilton, 481*

10. *A Woman can not Obtain License for Sale of.—Sale by Unlawful.*—A woman is inhibited by statute from obtaining a license to vend intoxicating liquors at retail, and when they embark in such business they engage in an unlawful act. *Id.*

INTOXICATION.

See INTOXICATING LIQUORS, 7.

ISSUES.

See CONTRIBUTORY NEGLIGENCE, 3, 4; MASTER AND SERVANT, 8.

JOINT TENANCY.

See DEED, 1.

JUDGMENT.

See COUNTY COMMISSIONERS, 2; INTOXICATING LIQUORS, 8; NEW TRIAL, 2; NUISANCE, 2; PLEADING, 1; QUIETING TITLE, 1, 3, 8; SUPREME COURT PRACTICE, 6; VARIANCE.

1. *Review of.—Divorce Proceeding.—Attachment.—Alimony.*—An action will not lie to review a judgment in attachment and for alimony in a divorce proceeding, the judgment in attachment being merely in aid of the suit for divorce and alimony, and not an independent proceeding. *Keller v. Keller, 38*
2. *Order Subsequent to Final Judgment.—Review of on Appeal.—With-*

drawal of Deposit to Secure Costs.—An order made after the rendition of the judgment from which the appeal is taken, and which does not affect the judgment, such as an order allowing a party to withdraw from the clerk money deposited as security for costs, is not available on appeal. *Shedd v. Disney, 240*

3. *Signing by Trial Judge.—Presumption.—Record.—Transcript.*—The transcript of the record need not show that the judgment appealed from was signed by the trial judge, the presumption being in favor of such signing. The judge is only required to sign the record of each day's proceedings once, which may include a great number of judgments. *Ferris v. Udell, 579*

4. *Foreclosure of Mortgage.—Res Adjudicata.—Assignment for Benefit of Creditors.—Bankruptcy.—Purchaser Pendente Lite.—Collateral Attack.*—A, a corporation, executed a deed of assignment to R. for the benefit of its creditors, among which were certain lots. Subsequently to the assignment, A, upon petition in the United States District Court, was duly adjudged a bankrupt. R., upon order of the State court in which the assignment proceedings were pending, turned over to the assignee in bankruptcy of A all of the property rights, credits and effects of said bankrupt, but made no deed or conveyance of the lots or any of the assigned real estate to the assignee in bankruptcy. The assignee in bankruptcy sold the lots to H. At the time of the assignment by A to R., B. and S. held a judgment lien on the land of A, which, after the sale by the assignee in bankruptcy, they foreclosed and became the purchasers at the foreclosure sale, and received a certificate of purchase, one-half of which they had assigned to F., but which had not been recorded when E., a mortgagee of H., brought suit against H., B. and S. and others to foreclose his mortgage on said lots, which resulted in a judgment in favor of E.

Held, that a decree in a suit to foreclose a mortgage, adjudicating the titles involved, is conclusive upon the parties.

Held, also, that if a judgment necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined the same way in all subsequent actions between the same parties or their privies.

Held, also, that E.'s foreclosure suit necessarily adjudicated two things, viz: (1) That the sale of the lots in question by the assignee in bankruptcy as against B. and S. was valid and binding; and (2) that the sheriff's sale to B. and S. on execution on their judgment was invalid against H., the purchaser at the bankrupt sale.

Held, also, that F., the assignee of B. and S. of one-half interest in the certificate of purchase, should be regarded as a purchaser *pendente lite*, and bound by the decree in favor of E., for such assignment had not been recorded, as the statute provides, when E. instituted his suit, having no notice of the assignment.

Held, that as the court, in the foreclosure suit by E., had jurisdiction of the subject and the parties, and the adjudication was within the issues, it is conclusive against a collateral attack, even though the decree be full of errors. *Ib.*

5. *Judicial Sale.—Redemption.—Effect on Judgment.—Conclusiveness of Judgment.*—The only effect of a sale on a judgment is to satisfy or pay the same, and the only effect of a redemption is to extinguish the sale (not the judgment) by making the payment in money instead of the sale. The judgment, though paid, is a complete bar, and conclusive of everything therein adjudicated. *Ib.*

6. *Quieting Title.—Reformation of Decree as Against Subsequent Purchaser.*—A decree quieting title will not be reformed at the suit of a grantee of one who was a party thereto, as against a purchaser for value under the decree, on the ground that the plaintiff's grantor was prevented from defending by information from the attorney for the judgment plaintiff that the land claimed by him was not included in the complaint to quiet title, unless it is shown at least that the land purchased from such judgment plaintiff was purchased with knowledge of the erroneous information inducing the default. *Craig v. Major, Exr., 624*

JURISDICTION.

See APPEAL, 2; APPELLATE COURT; BOARD OF CHILDREN'S GUARDIANS, 1, 2, 3; COUNTY COMMISSIONERS, 1; PROCESS; SUPERIOR COURT.

JUROR, QUALIFICATION OF.

See INTOXICATING LIQUORS, 5, 6.

JURY.

See INSTRUCTIONS TO JURY; TRIAL.

1. *Struck Jury.—Party Present but Refusing to Strike.—Withdrawal of Demand.—Clerk May Strike.—Motion to Quash Venire.*—Where a party demands a struck jury and attends at the time fixed for striking the same, and is furnished by the clerk with a list of the names selected which he considers, and then announces that he withdraws his demand for a struck jury and refuses to proceed further, the clerk is authorized to proceed as in the case of an absent party, and a motion by the party demanding such struck jury to quash the venire should be overruled. *Dorsey Machine Co. v. McCaffrey, 545*
2. *Viewing Premises.—Discretion of Court.*—In order to make the refusal of the trial court to let the jury view the scene of an accident available error it must be shown that there was an abuse of discretion. *Board, etc., v. Nichols, 611*

LAW AND FACT.

See INTOXICATING LIQUORS, 7.

LEGAL HOLIDAY.

See CRIMINAL LAW, 2.

LIBEL.

Defense.—Justification.—Sufficiency of Evidence.—When Evidence not Broad Enough.—Where an answer set up in an action for libel is that of justification, the same objection that might be urged against the answer, viz., that it is not broad enough to justify the charge published, may be urged against the sufficiency of the evidence. *Miller v. McDonald, 465*

LICENSEE.

See NEGLIGENCE, 8.

LIEN.

See INCUMBRANCES; QUIETING TITLE, 6, 8.

On Lands of Decedent.—When May be Enforced After Final Settlement.—Contribution.—Where a person holds a specific lien on real estate of a decedent, as for contribution for money paid by a co-surety, he can either file his claim therefor against the decedent's estate, or he may enforce such lien against the land after final settlement of the estate, for liens continue against real estate unless discharged by decree or payment. *Beach v. Bell, 167*

LIFE ESTATE.

See CONVEYANCE, 2, 4, 7; SALE, 2.

MANDAMUS.

Alternative Writ, Insufficiency of.—Demand.—Public Ditch, Obstruction of.—Railroad.—Township Trustee.—In a mandamus proceeding by a township trustee against a railroad company, to compel the removal of an obstruction from a public ditch, the alternative writ is insufficient on demurrer where it is not made to appear that the plaintiff had demanded of the defendant that the obstruction be removed. *Lake Erie, etc., R. R. Co. v. State, ex rel., 158*

MARRIED WOMAN.

1. *Contract of Suretyship.—Not Bound by Form of.—Facts Control.*—A married woman is not bound by the mere form of the contract into which she enters, but the facts must control in determining the question whether the wife or her property is surety for another. *Bowles v. Trapp, 55*
2. *Promissory Note.—Surety for Her Husband.—Sole Maker of Note.—Defense.*—Where a person loaned money on the individual note of the wife, retaining part thereof in payment of the husband's debt, and paying the remainder to the husband, knowing it was loaned to be applied and appropriated by him to his sole use and benefit, and knowing that the words in the note: "For my sole use and benefit only," as well as the form of the contract, did not express the transaction, such facts constitute a complete defense to an action on the note, against the wife, by the payee. *Ib.*
3. *School Fund Mortgage on Her Separate Property to Secure Husband's Individual Debt.—Void.—Sale May be Enjoined.*—Where it does not appear that a married woman made the statutory statement to obtain a school fund loan, nor that she obtained the loan, but that it was made directly to the husband on his individual note, the only act of the wife being to unite with her husband in the execution of the mortgage on land owned by the husband, and also upon land owned by her in her own right, to secure the note, the mortgage as to the wife's land is void, and its sale may be enjoined. *Welch v. Fisk, Aud., 637*

MASTER AND SERVANT.

See NEGLIGENCE, 4; RAILROAD, 4.

1. *Safety of Premises.—Assumption of Hazards.—Pleading.*—Where it is alleged that "the usual, ordinary and safest" way of passing from an elevated tramway into the defendant's adjoining mill was through a dormer window, it can not be assumed from an averment that the plaintiff's (the servant's) first use of the window was in passing from the tramway into the mill that he had mounted the tramway by a safer method, and that he therefore assumed the hazards of the use of the window. *Salem Stone and Lime Co. v. Griffin, 141*
2. *Construction of Premises.—Equality of Knowledge.*—Where the dangerous agencies leading to the injury of an employe arise out of the negligent construction of the premises, he is not bound to show absence of opportunities, equal to the employer's, for discovering the danger. *Ib.*
3. *Prior Injury to Another at Same Place.—Evidence of Admissible to Show Notice to Master.*—For the purpose of showing notice to the employer of a dangerous condition, evidence that prior to the injury sued for another person was injured at the same place in the same way, is admissible. *Ib.*

4. *Freedom from Fault.—Instruction as to.*—An instruction that an employe, who has used ordinary care to discover the dangers of the place in which he works, and who is injured by reason of a danger not so discoverable, is free from fault, is not objectionable, if the conditions necessary to a recovery are fully given in other instructions. *Ib.*
5. *What Risks are Assumed and What Not.—Notice to Employe of Danger.*—Implied assumptions of risks are only such as are naturally incident to the service, and those which are known, or discoverable by ordinary care, but disregarded by the servant. Dangers which are unknown to the servant, or not discoverable by ordinary care, but which are, or should be, by ordinary care, known to the master, are not assumed, and as to such the master is bound to give notice. *Ib.*
6. *Time of Giving Notice.*—Notice of an unassumed danger must be given before the service involving it is required, and it is not necessary that it should be given at the time of the contract of employment; but where no notice was given at any time, an instruction fixing it at the time of employment is harmless. *Ib.*
7. *Walk.—Use of.—Ignorance of Danger.—Contributory Negligence.*—A walk constructed along a tramway is an invitation to its use, and a servant going upon it in the performance of a duty, without knowledge of dangerous projections from the tramway cars which make it unsafe, is not guilty of contributory negligence. *Ib.*
8. *Extra Hazard.—Not in Issue.—Finding Disregarded.*—Where the question of extra hazard is not in issue, a finding as to that fact by the jury must be disregarded.
Neutz v. Jackson Hill, etc., Co., 411
9. *Notice to Employer.*—An employe is not, as a condition precedent to recovery for an injury, required to notify his employer of a fact which the employer is bound to know.
Pennsylvania Co. v. McCaffrey, Admx., 430
10. *Railroad.—Unblocked Frog.—Injury to Brakeman.—Ignorance of Blocking Device.—Assumption of Risk.*—A brakeman upon a railroad not using blocks in its frogs and switches, who is killed in the line of his service by getting his foot caught in an unblocked frog, and who at the time of the accident had no knowledge that such protecting devices as blocks were in use upon any railroad, will be held to have assumed the risk, although it is averred that he had no time or opportunity to observe whether or not the particular frog was blocked.
Sheets, Admr., v. Chicago, etc., R. W. Co., 682
11. *"Kicking" Cars Into Switch.—Rule of Company.*—Where a freight conductor gives an order to place cars upon a side track, and couple them with others standing upon said side track, without instructions as to the manner of doing it, and the trainmen in executing the order make a "kicking" switch, and a brakeman, voluntarily going in front of the detached, uncontrolled, and rapidly moving cars to make the coupling gets his foot fastened, in an unblocked frog, and is run down and killed, an action will not lie against the company, even though the latter had in force no rule prohibiting the making of switches of the character alleged. *Ib.*
12. *Fellow-Servants.—Incompetent Fellow-Servant.—Voluntarily Going into Danger Caused by.—Attempting to Make Perilous Coupling.*—An engineer is a fellow-servant of a brakeman, and a recovery against the railroad company for the death of the brakeman by a negligent act of the engineer in kicking cars into a siding at an ex-

cessive speed, even if the company had knowledge of his incompetency, and the brakeman had not, will not be allowed where it appears that such brakeman being experienced, and with knowledge of the excessive speed, and of the danger of attempting to couple the detached cars to others standing upon the sidetrack, undertook such perilous task as a brakeman, even when acting in pursuance of an order to couple the cars, is not bound to do so under such dangerous conditions. *Ib.*

MISTAKE OF FACT.

See REFORMATION OF INSTRUMENT, 1, 2, 3.

MISTAKE OF LAW.

See REFORMATION OF INSTRUMENT, 3.

MORTGAGE.

See CANCELLATION OF INSTRUMENT, 1, 2; JUDGMENT, 4; PARTIES, 2; RECEIVER, 2; SCHOOL FUND MORTGAGE; TITLE, 5; TRUST, 2.

1. *Subrogation.—Foreclosure.—Payment.—Extinguishment.*—Where the holder of a prior mortgage brings suit to foreclose it, making a junior mortgagee a party, and a decree of foreclosure is given, upon which there is a sale of the mortgaged land to the plaintiff, who takes a certificate of sale, and who, later, believing the junior mortgage cut out by the decree, accepts partial payment of his judgment and takes a new mortgage upon the land for the balance from an intervening purchaser, to whom he assigns the certificate of sale without any knowledge that such purchaser had agreed to pay off the incumbrances, the lien of the first mortgage is not extinguished by the execution of the second one for the same debt, but the former will be kept alive to protect its holder from the intervening lien. And, also, where a still later purchaser of the land, without knowledge of the intervening mortgage, applies for and secures a loan thereon from a third person, who likewise is ignorant of such mortgage and who believes that the second mortgage executed to the senior incumbrancer is the only lien upon the land, and a part of the loan so secured is used in paying off such lien, such last mortgagee is entitled to be subrogated to the rights of the holder of such lien to the extent of the money paid thereon out of the loan made by him, as against the intervening mortgagee and the persons succeeding to his rights with knowledge, and as to so much he is entitled to a first lien.

Thompson v. Connecticut Mut. Life Ins. Co., 325

2. *By Husband and Wife on Land Held by Entireties.—Subsequent Acquisition of Title to Whole by Husband.—Lien of Mortgage.—Divestment of.*—If at the time a husband and wife executed a warranty mortgage on certain land, to secure the husband's debt, they held it as tenants by entireties, of which fact the mortgagee was ignorant, and believed the title to be in the husband, but subsequently the husband acquires title to the whole of the land described in the mortgage, such mortgage became a binding lien on the land, and he can not divest such lien by a subsequent conveyance.

Thalls v. Smith, 496

MOTION.

See PRACTICE, 3.

MOTION TO MAKE SPECIFIC.

See BRIDGE, 2.

MOTION TO QUASH.

See JURY, 1.

MOTION TO STRIKE OUT.

See INTOXICATING LIQUORS, 4.

MUNICIPAL CORPORATION.

See TOWN.

1. *City.—Improvement Assessment.—Non-Bordering Lot.—Liability of.—Act Construed.*—Under the act of March 8, 1889 (Acts 1889, p. 237; R. S. 1894, section 4288 *et seq.*), assessments for street improvements can only be made against lots bordering upon the street as designated by plat or other subdivision, and the liability of other lots back from the bordering lot and lying within one hundred and fifty feet of the street improved, arises only in the event that the bordering lot, against which the whole assessment must be levied, fails to sell for a sum sufficient to pay the assessment, and then only for the deficit, in the order fixed by the statute. *City of Terre Haute v. Mack, 99*
2. *Void Assessment.—Injunction.—Appeal.*—The act of the engineer in apportioning a part of the cost of a street improvement upon a non-bordering lot, and of the city common council in assessing such amount against such lot are void, and the collection of such assessment will be enjoined, particularly as such acts are ministerial, from which no appeal has been provided by statute. *Ib.*
3. *Primary Liability of First Fifty Feet.—Must be Owned by One Person.*—In so far as the first part of the proviso in section 3 of said act seems to indicate an intention to make the whole of the first fifty feet back from the front primarily and alike liable, it must be held to apply only to a case where one person owns the whole of the first fifty feet. *Ib.*
4. *City.—Ordinance.—Water Company.—Police Regulation.*—An ordinance in relation to a water company, for protection against fire, is not a police regulation, nor one which the municipality is under obligation to enact or enforce. *Fitch v. Seymour Water Co., 214*
5. *City Ordinance.—Governmental Measure.—Water Company.—Insufficient Water Pressure.—Loss by Fire.—Liability.*—Such an ordinance is a governmental measure which the city might enact or not as seemed best. There is no public duty under such ordinance, the violation of which would render the city or the water company liable to any one who might suffer a loss of property by fire because of an insufficient water pressure, where sufficient pressure might have been supplied and the loss avoided. *Ib.*
6. *Water Company.—No Public Duty.—No Privy in Contract, by Citizens.*—In such case the water company had undertaken no public duty which would make it liable to an inhabitant of the municipality, and the citizen has no privy in the contract of the city with the company. *Ib.*

NATURAL GAS.

See CONTRIBUTORY NEGLIGENCE, 1, 2; NEGLIGENCE, 6, 7.

NEGLECT.

See BRIDGE, 1; CONTRIBUTORY NEGLIGENCE; RAILROAD, 1, 2, 3.

1. *Damages.—Action by Administratrix.—Averment that Plaintiff was Free from Fault Not Necessary.*—It is not necessary to allege in a complaint by a wife, as administratrix, to recover damages for negligently causing the death of her husband, that she was free from fault. *Pittsburgh, etc., R. W. Co. v. Burton, Admr., 357*
2. *Averment as to Inability to See and Hear.—Effect of.*—In a com-

plaint to recover for negligently causing the death of the plaintiff's decedent at a railroad crossing, an allegation that the deceased was "unable to see or hear any engine or train of cars in motion on account of" certain described obstructions, is equivalent to an allegation that he did not see or hear the engine or train. *Ib.*

3. *Contributory Negligence.—Pleading.—When Specific Controls General Allegation.*—A specific allegation will not control a general allegation of freedom from contributory negligence unless the specific allegation appears to include all of the occurrence and stands in conflict with that otherwise embraced in the general allegation. *Ib.*

4. *Of Fellow Servant.—Vice Principal.—Defective Cars Furnished for Shipping Purposes.—Master and Servant.—Personal Injury.*—Where cars furnished to a coal and coke company, for shipping purposes, were defective, in that the brakes were worn out, and in some instances entirely wanting, the cars being placed on the grade above the "tipple," or place of loading, the defective cars being placed between other cars, and in moving a car down near to the "tipple," by servants of the coal and coke company, whose duty it was to inspect and test the brakes on the cars so as to see that they could be let down to a point near the "tipple" in safety, a car with defective brakes, and otherwise unsecured, followed at a high rate of speed, striking the car in charge of said servants, and driving it into collision with that upon which another servant was engaged in loading, thereby inflicting injuries upon him,—the failure to inspect, to set brakes, or to block the wheels was negligence in the use of, and not in the supplying of, instrumentalities, and was consequently the negligence of fellow servants, and not of vice principals. The extent of the coal and coke company's control over the cars was in the use of them for loading coal, and it was not responsible to the injured servant, or any one else, for their sufficiency as a means of transportation.

Neutz v. Jackson Hill, etc., Co., 411

5. *Sudden Danger.—Conduct of Imperiled Person.—Contributory Negligence.*—If one acts naturally in a case of sudden and instant peril put on him by another, and is injured, he is not guilty of negligence, although afterwards, out of the presence of danger, with time to reflect, and in the light of all the known facts, it may appear that another course of conduct might have led to safety.

Pennsylvania Co. v. McCaffrey, Admz., 430

6. *Natural Gas.—Laying Pipe Line Loose Upon Public Highway.—High Pressure of Gas.—Pipes Poorly Jointed.*—Where it is charged and established that the defendants laid a three-inch natural gas pipe loose upon the public highway, and transported through such pipe natural gas at the dangerous pressure of three hundred pounds to the square inch, the pipe being poorly jointed, and permitting gas to escape therefrom, negligence on the part of the defendants is sufficiently shown.

Lebanon, etc., Co. v. Leap, 443

7. *Joint Tort Feasors.—Parties to Action.—Natural Gas.—Pipe Line.—Personal Injury.—Explosion.*—Where the gas wells were drilled by a sub-contractor, the pipes being furnished by the contractor and put together by the sub-contractor, and after the sub-contractor had ceased to use the pipes and gas for drilling purposes, the agents of the contractor took up the north and south line, which connected with the east and west line, leaving one joint connected with the T, after which the accident happened,

the pipe line being then solely the property of the contractor, he must thereafter be held to have assumed the sub-contractor's former charge of caring for the pipe, which, after the accident, was used as a part of a permanent line. And where, before the accident, gas was delivered to the company by the contractor, partly through the pipe line in question, the company, as well as the contractor, is liable, notwithstanding the fact that the contractor had not, at the time of the accident, fully completed his contract, nor formally turned over the plant to the company, which was in actual use of gas which flowed through the pipe in question. *Ib.*

8. *Licensee.—Trespasser.—Duty to.—Railroad.—Complaint, Theory of.—Personal Injury.*—Where the complaint in an action against a railroad company, for personal injury, was drawn upon the theory of negligence by the railroad company causing the injury to the plaintiff, a servant of C., engaged at the time with C. in loading hogs in a car furnished by the railroad company for C. upon his request, while the answers to interrogatories establish that, without notice to the railroad company of an intention to load the hogs, such servant and one of his employers pushed a car, not furnished for C., up to the chute and loaded the same,—the plaintiff, if not a trespasser, was a mere licensee, to whom the defendant owed no protection from negligence.

Cleveland, etc., R. W. Co. v. Stephenson, 641

NEW TRIAL.

See BILL OF EXCEPTIONS, 1.

1. *As of Right.—Abandonment of.—Right to Commence Action Anew.*—Where parties are entitled to a new trial as of right, they can not abandon such right by dismissing the cause, and then commence the action anew. *Ferris v. Berkshire Life Ins. Co., 486*
2. *As of Right.—Dismissal of.—Effect on Vacated Judgment.—Restoration and Conclusiveness of.—Case Distinguished.*—The dismissal of a cause of action, after the grant of a new trial as of right, has the effect of restoring the conclusive character of the vacated judgment, against all the parties and their privies, on the ground that it was only vacated for the one purpose under the statute, viz., to allow the defeated party one more trial, if he chose to avail himself thereof. *Carmikel v. Cox, 58 Ind. 133, distinguished.*

Ferris v. Udell, 579

NEW TRIAL AS OF RIGHT.

See NEW TRIAL, 1, 2; REAL ESTATE, 2.

NONRESIDENT.

See TAX SALE.

NOTICE.

See APPEAL, 4; BOARD OF CHILDREN'S GUARDIANS, 3; MASTER AND SERVANT, 5, 6, 7, 9; QUIETING TITLE, 7; RAILROAD, 5; TITLE, 5.

- Of Issuance of Precepts for Street Assessments.—Validity of.—Error in Amount of Assessment.*—The notice of the issuance of precepts for street improvements is not invalid as to an assessment, where the notice states the amount of assessment at \$32.10 instead of \$32.20, the correct amount, as the law does not observe trifles, and the error not being such as to deceive or control the action of one of ordinary business capacity. *Burt v. Hasselman, 196*

NUISANCE.

1. *Towns.—Power to Abate Nuisance.—Right to Resort to Courts.*—The power conferred by statute upon incorporated towns to declare and abate nuisances does not exclude a resort to the courts for such purpose. *American Furniture Co. v. Town of Batesville*, 77
2. *Obstruction of Way.—Insufficient Description.—Decree.—Modification.*—Where, in a suit by a town to abate an obstruction in a highway, the complaint and verdict are so uncertain as to the location of the obstruction that no definite order of abatement can be based thereon, a motion to modify the decree so as to eliminate the order of abatement should be sustained. *Ib.*

OBSTRUCTION OF DITCH.

See MANDAMUS.

OBSTRUCTION OF HIGHWAY.

See NUISANCE, 2.

ORDINANCE.

See MUNICIPAL CORPORATION, 4, 5.

OWNERSHIP.

See EVIDENCE, 3.

PARENT AND CHILD.

See BOARD OF CHILDREN'S GUARDIANS, 3, 4; CONTRACT, 2.

PARTIES.

See APPEAL, 1, 2, 3, 4, 6, 7; CORPORATION, 3; NEGLIGENCE, 7; PARTY IN INTEREST; PLEADING, 1; QUIETING TITLE, 1, 3; SUPREME COURT PRACTICE, 5.

1. *Necessary Party.—Party in Interest.—Sufficiency of Complaint.—Payment.—Multiplicity of Suits.—Insurance Company.—Subrogation.*—A mortgaged his land to B to secure a loan of \$1,000, and as a further security for such sum A procured from C a policy of insurance upon a dwelling house situated upon such land in the sum of \$300. Afterwards A conveyed the land to D, without the consent of C and without any assignment of the policy, but upon the agreed consideration, in part, that D should assume and pay the said mortgage. The mortgage clause in the insurance policy provided, among other things, "that whenever this company shall pay to the mortgagee or beneficiary any sum for loss under the policy, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party on the property in question, for the payment of said debt; but such subrogation shall be in subordination to the claim of said party for the value of the debt so secured, or this company, at its option, may pay to the mortgagee or beneficiary the whole of the debt so secured, * * * and shall thereupon receive from the party to whom such payment is made an assignment and transfer of said debt, with all securities held by said party, * * * for payment thereof." Soon after the sale to D the dwelling house was destroyed by fire. C paid B the amount of the insurance, \$300, and received an assignment of that amount under the note and mortgage, by virtue of the contract of subrogation contained in the policy. C brought suit against D for subrogation, for foreclosure of the mortgage, for personal judgment and for judgment on the note secured by the mortgage to the extent of the assignment and interest, and alleging that the fraction of the debt re-

tained by B, upon the assignment of the part in suit, has been fully paid, the fact of payment being admitted by demurrer. Did the complaint state facts sufficient?

Held, that as the complaint contained the allegation of payment of the part of the debt held by B, B was not a necessary party to the action by C against D, B not being a party in interest.

Held, also, that the allegation of payment of the part of the indebtedness held by B after the assignment to C was essential to C's recovery and the protection of D against a multiplicity of suits.

Insurance Co. of North America v. Martin, 317.

2. *Necessary Party.—Variance in Description.—Insurance Policy.—Complaint.—Mortgage.*—In such case the complaint and mortgage described the property as the s. w. qr. of section 23, tp. 31, range 8, while in the policy it was described as s. w. qr. of section 23, range 31, tp. 8.

Held, that upon the theory (arising upon the variance in description) that the complaint alleges a mortgage security upon one property and an insurance upon another, which other is presumed to have been destroyed as the property of A, A (the mortgagor and vendor) was a necessary party to the action, and not having been made a party, the complaint was fatally defective. *Id.*

PARTITION.

See CONVEYANCE, 6, 8; DECEDENTS' ESTATES, 1, 2; ESTOPPEL, 1; SUPREME COURT PRACTICE, 2, 3; WILL, 12.

1. *Tenants in Common.—Valuable Improvements.—When Entitled to Compensation.*—Where one tenant in common makes necessary, valuable and lasting improvements, he is entitled to compensation therefor, on partition. *Parish v. Camplin*, 1
2. *Amendment of Pleading.—Commissioners' Report.*—A complaint in partition may be amended so as to conform with the report of the commissioners. *Bower v. Bowen*, 31
3. *Title.*—The pleadings in a suit for partition may be so framed as to raise and settle questions of title, but where they are not, and only the matter of partition is adjudicated, the title is held as before. *Stephenson v. Boody*, 60

PARTNERSHIP.

See ACTION, 4, 5.

Legal Rights.—Contractual Rights.—Relief.—A partner who is being defrauded has access to the courts for relief, notwithstanding contractual stipulations. *Adams v. Shewalter*, 178

PARTY IN INTEREST.

See APPEAL, 6.

PAYMENT.

See PARTIES, 1.

PERPETUITIES.

See WILL, 3.

PERSONAL INJURIES.

See EVIDENCE, 6; NEGLIGENCE, 7, 8.

PERSONAL PROPERTY.

See EVIDENCE, 2.

PLEADING.

See AGENCY; ANSWER; BRIDGE, 1, 2; COMPLAINT; CROSS-COMPLAINT; HARMLESS ERROR, 1, 2; NEGLIGENCE, 3; REPLY.

1. *Complaint.—Administrator.—Party to Record.—Final Judgment.—Appeal.*—Where an administrator is made a party to an action upon application of the plaintiff, and his name appears in the list of defendants given in the title of the action, he is a party to the record, although there is no allegation in the complaint that he is administrator or in any manner connecting him with the cause of action, and if the judgment rendered is broad enough to preclude all the parties, he is entitled to appeal; and as the verdict could not cure a defect consisting in the omission of facts essential to a cause of action, the complaint as to him will be held to be insufficient. *Jones v. Casler, 382*
2. *Answer.—Specific Denials.—Demurrer.*—An answer setting out specific denials of the cause of action is bad on demurrer when a general denial is pleaded, under which the same proof may be made. *Board, etc., v. Nichols, 611*

POLICE REGULATION.

See MUNICIPAL CORPORATION, 4.

POSSESSION.

See CONVEYANCE, 3; EVIDENCE, 2.

PRACTICE.

See QUIETING TITLE, 3; SUPREME COURT PRACTICE.

1. *Default by Litigant.—Rule or Order of Court.*—A litigant can only be in default when he fails to discharge or satisfy some rule or order of the court entered against him. *Baltimore, etc., R. R. Co. v. Eggers, 24*
2. *Exception.—Available Error.*—To an objection not reserved by an exception, no error can be made available. *Sharpe, Adm., v. Commercial, etc., Acc. Assn. of America, 92*
3. *Joint Motion.—Must be Good as to all it Embraces.*—No error can be based upon the overruling of a joint motion unless it is good as to all the matters embraced therein. *Board, etc., v. Nichols, 611*

PRECEPTS FOR STREET ASSESSMENTS.

See NOTICE.

PREFERENCE OF CREDITORS.

See FRAUDULENT CONVEYANCE, 4.

PRESUMPTION.

See ACTION, 1; HIGHWAY, 2; JUDGMENT, 3; SPECIAL VERDICT, 8; WILL, 5.

PRINCIPAL AND SURETY.

See HUSBAND AND WIFE; MARRIED WOMAN, 1, 2, 3.

PROCESS.

Summons.—When Necessary to Issue.—Cross-Complaint.—Jurisdiction.—Where a cross-complaint is filed, setting up a cause of action not disclosed in the original complaint, it is necessary to issue process thereon against the defendants therein named, in order to acquire jurisdiction over their persons. *Shaul v. Rinker, 163*

PROMISSORY NOTE.

See CANCELLATION OF INSTRUMENT, 1, 2; MARRIED WOMAN, 2.

PUBLIC DUTY.

See MUNICIPAL CORPORATION, 6.

PUBLIC POLICY.

See CONVEYANCE, 4; INTOXICATING LIQUORS, 9.

PURCHASER, PENDENTE LITE.

See JUDGMENT, 4; CONVEYANCE PENDENTE LITE.

QUANTUM MERUIT.

See TRUST, 1.

QUIETING TITLE.

See JUDGMENT, 6; REAL ESTATE, 2, 3; SALE, 5; SUPERIOR COURT; VARIANCE.

1. *Necessary Party.—Judgment.*—The holder of a tax sale certificate is not a necessary party to a suit by one claiming under a prior tax deed to quiet title as against the original owners of the land and a decree quieting title in such suit is not void as to him because he is not made a party. *Shedd v. Disney, 240*
2. *Transfer of Land Pending Suit.—Effect of.*—Where, pending suit to quiet title to real estate, a part of the land is transferred by the plaintiff, the cause may, under section 271, R. S. 1881, proceed to final judgment in the name of the plaintiff, in the same manner as if there had been no transfer. *Id*
3. *Parties Defendant.—Omission of Lienholder as Party.—Effect of Decree.—Practice.—Waiver.—Collateral Attack.*—The omission of the owner of the equity of redemption as a party to a suit to quiet the title to the land in controversy would not prevent the decree from operating to bar and foreclose those who were parties to the suit, and who were decreed to be barred and foreclosed; and the objection that the owner of the equity of redemption was not a party to the suit could only be taken in that cause by demurrer or by answer (not in a collateral suit), and not being so taken, the objection is waived. *Browning v. Smith, 280*
4. *Against Superior Lienholder.—Payment or Offer to Pay.—Equitable Relief.*—Where a party seeks to have title quieted against superior lienholders, before he can ask the interposition of a court of equity in his behalf, he should either pay, or offer to pay, the superior lien against which he seeks to quiet title. *Id.*
5. *Complaint.—Demurrer.*—A complaint in the usual form to quiet title to real estate, which alleges that the defendants have no interest in the property, and no lien of any kind thereon, is not rendered bad on demurrer because it appears by subsequent pleadings and the evidence that the defendant held a valid lien for taxes paid. *Cole v. Gray, 396*
6. *Deed.—Can not be Varied by Parol.—Tax Lien.—Transferred by Deed Notwithstanding Oral Agreement.*—A deed can not be contradicted, changed or modified by previous or contemporaneous oral negotiations, stipulations or agreements inconsistent with its terms; and so where the vendee of the holder of an invalid tax deed seeks to enforce the lien given by statute, an answer that at the time of taking his conveyance from the holder of the tax deed the plaintiff and his grantor had agreed that such conveyance should not transfer either the title or the lien for taxes, but should merely operate as a release of the lien, and that subsequently the defendant had paid to the plaintiff's grantor the full amount due on account of the tax sale and taken to himself a quitclaim deed, is bad. *Id.*

7. *Redemption from Tax Sale.—Recorded Deed.—Notice.*—In making redemption from a tax sale the owner is bound to know, where a conveyance from the holder of a tax deed to a third person is upon record, that such conveyance carried to the grantee the purchaser's lien. *Ib.*
8. *Judgment Lien.—Tax Lien.*—The question involved here, that the title of one holding under a judgment lien can not be quieted until the tax lien thereon is discharged, was decided in *Browning v. Smith*, 139 Ind. 280. *Ferris v. Berkshire Life Ins. Co.*, 486

RAILROAD.

See INJUNCTION, 1; MANDAMUS; MASTER AND SERVANT, 10; NEGLIGENCE, 8; STREET RAILROAD.

1. *Street Crossing.—Obstructions.—Finding as to How Far Trains Could be Seen.—Negligence.*—Where one driving along a street which crosses two parallel railroad tracks, thirty-five feet apart, exercises due care in approaching and passing the first track, which is a side track, with cars standing thereon so as to obstruct the view of the main track, and then looks and discovers a train, which has not given the required signals, rapidly approaching upon the main track, and makes every possible effort to avoid a collision, it is immaterial how far he could have seen the train when he had crossed the side track, and a refusal to require the jury to make a finding upon that point is not error.
Pittsburgh, etc., R. W. Co. v. Burton, Admx., 357
2. *Killing at Street Crossing.—Neglect to Give Signals.—Limit of Damages.—Statute Repealed.*—The act of March 29, 1879 (Acts 1879, p. 173; R. S. 1881, section 4020, *et seq.*), in so far as it fixes the damages recoverable for injuries caused by the failure of a railroad company to give certain signals at a highway crossing at five thousand dollars, was repealed by the general act of April 7, 1881 (R. S. 1881, section 284; R. S. 1894, section 285), fixing the limit of damages in all actions for death by the wrongful act of another at ten thousand dollars. *Ib.*
3. *Care Required of Traveler at Crossing.—Care Stated.—Omission of Signals.—Contributory Negligence.*—One who is about to cross over a railroad track at a street crossing is only required to exercise prudence and caution in proportion to the dangers incident to the crossing, with its obstructions and peculiar hazards; and so one who, being in possession of all of his faculties, drives toward a crossing with care, stops and looks and listens at a parallel side track thirty-five feet distant from the main track, but can hear no approaching train and can see none by reason of obstructing cars upon the side track, passes over the side track, again looks and listens and then cautiously approaches the main track and when near it discovers a rapidly approaching train, which so frightens his ordinarily gentle horses that, notwithstanding his strongest efforts, they run forward upon the track and the driver is killed, is not guilty of negligence, and damages may be recovered where it appears that the defendant's servants in charge of the train negligently omitted to give the signals required by law. *Ib.*
4. *Master and Servant.—Section Foreman.—Sudden Peril.*—A section foreman who, after a train has passed, orders his hand car placed upon the track, and while it is being so placed, suddenly discovers that the train, without warning is backing down the track, and hurriedly attempts to get the hand car out of the way, and then, being unable to do so, attempts to step off the track

and in doing so falls and is killed by the hand car being pushed upon him by the train, is not guilty of negligence.

Pennsylvania Co. v. McCaffrey, Admx., 430

5. *Excessive Hours of Employment.—Railroad Company Bound to Know that Employes Will Leave Train to get Food.*—Where a railroad company so arranges the time schedule for one of its trains that the train crew are required to work nineteen hours consecutively each day, without relief or provision for food, the company is bound to know that the men will leave the train at intervals for food, and it will be held to assent thereto, and their so leaving the train for such a purpose is not negligence on their part. *Ib.*
6. *Railroad Company Must Provide Enough Servants at all Times.*—It is the duty of a railroad company to provide a sufficient force for the proper management of its trains, and when, by reason of the number of hours of continuous service some of the trainmen, are habitually compelled by hunger to temporarily leave the train it is the duty of the company to either stop the train until their return or to supply their places with other competent men, and for an injury resulting from a breach of this duty it is liable. *Ib.*
7. *Liability of Railroad Company to Section Foreman.—Case Stated.*—A railroad company which requires such continuous service from a train crew as to be chargeable with notice that they leave the train to obtain food is liable for the death of a section foreman who, although knowing of the habit but not shown to have had knowledge of the absence of the conductor and engineer on the particular occasion, and being without fault, is killed by reason of the train moving backwards upon the track in sole charge of the fireman, without any signals being given, and without any signalman on the rear car to give warning of danger. *Ib.*
8. *Extending Street Over Railroad Yards Containing Switches, Engine House, etc.—Injunction.*—If, to extend a street as projected, over the yards of a railroad company, containing side tracks, engine house, water tank, coal dock, etc., would not only increase the hazards of the business, but would include within the limits of said street two stalls of said roundhouse and a considerable portion of the coal dock, and would not permit the use of the water tank, without encroaching upon the street, the land can not be thus appropriated for street purposes, and such threatened appropriation may be enjoined.
Cincinnati, etc., R. W. Co. v. City of Anderson, 490
9. *Use of Ground for Yards, Engine House, Coal Dock, etc., a Public One.—When More than One Public Use May be Made of the Same Land.—When Not.*—The use of the ground by the railroad for the purposes above mentioned is a public use, and where the use of the ground for railroad purposes and for street purposes may co-exist without impairment of the first use, it may be appropriated to the use of both; but where such uses can not co-exist, or where the first use is materially impaired or destroyed, the second public use will be denied. *Ib.*
10. *Standing Timber Close to Right of Way.—Possibility of Falling on Railroad Track.—Right of Railroad Company to Cut Down.—Damages.—Injunction.*—Where a railroad company, by its agents, without notice or permission, entered upon land adjoining its right of way and cut down growing timber, the only reason for such act being fear that the timber might fall upon the railroad track, owing to the close proximity of such timber to the railroad company's right of way, the railroad company is liable in damages

for the trees cut down, and may be enjoined from cutting other of such timber; the danger not being shown to be immediate and probable, but remote and barely possible, which was not sufficient to justify the acts complained of.

Toledo, etc., R. R. Co. v. Loop, 542

RAPE.

See CRIMINAL LAW, 4, 5, 6.

RATIFICATION.

See AGENCY; CORPORATION, 4.

REAL ESTATE.

See AGENCY; AGRICULTURAL LANDS; CONVEYANCE; DEED, 1; DESCRIPTION; HUSBAND AND WIFE; SALE, 1; STATUTE OF LIMITATIONS, 1; TRUST, 4.

1. *Childless Second Wife.—Estate of.—Conveyances by Children of Prior Marriage.—Construction of Statute.—Change of Rule.*—It was held by the Supreme Court, up to the May term 1881, that by the provisions of sections 2483 and 2487, R. S. 1881, a second or subsequent wife, having no child by her husband, took only a life estate in one-third of his lands where he left living children by a former marriage. At the May term 1881, the rule was changed, it being then decided that the wife under such circumstances inherited a fee simple in the undivided one-third of the husband's lands, and that at her death his children by the former marriage became her forced heirs.

Held, that conveyances made by children of a prior marriage during the life of the childless widow while the former construction prevailed carried to the grantee the fee simple.

Held, also, that the new construction of the statute can only be applied prospectively, and that upon the death of the childless widow after such construction was declared, the children of the former marriage took nothing as against their prior grantee.

Stephenson v. Boody, 60

2. *Cross-Complaint to Quiet Title.—New Trial as of Right.*—Where, in an action to reform an agreement to convey land, and for specific performance thereof, the defendant files a cross-complaint to quiet title, the latter may claim a new trial as of right under section 1064, R. S. 1881. *Island Coal Co. v. Streitlemier, 83*

3. *Quieting Title.—Sufficiency of Complaint.*—A cross-complaint by a defendant alleging ownership of land and that the plaintiff was falsely and without right asserting that he held the defendant's written contract to convey the land and was prosecuting his action to enforce specific performance of the contract, thereby casting a cloud upon the defendant's title, shows a claim of an adverse interest in the land, and is good. *Ib.*

4. *Incompleted Contract to Convey.—Delivery.*—Where a contract to sell "a strip off the north end of our farm" is signed by the parties, with an understanding that it is not to be obligatory until the owner shall have an opportunity to see where the marginal boundary lines will run, and such owner refuses to deliver the writing until the boundary lines are pointed out, and then, the boundaries not being satisfactory, absolutely refuses to deliver, there is no agreement, but only a preliminary negotiation. *Ib.*

5. *Contract to Convey.—Indefinite Description.—Specific Performance.*—It seems that an agreement to "sell a strip off the north end

of our farm in Stafford township, Greene county, Indiana, in shape as by diagram below, the boundaries extending north and south, being agreed upon as by diagram, and the boundaries east and west are yet to be determined upon later, but enough is to be sold to the Island Coal Company, at \$40 per acre, to (extending far enough east) cover their plant switches, pond and barn, and such as is necessary for coke ovens," the accompanying diagram being indefinite, is not sufficiently certain to be specifically enforced.

Ib.

6. *Title by Adverse Possession.—Twenty Years' Statute of Limitation.*—Twenty years of adverse possession of land under claim of ownership in fee confers as complete a title as a written conveyance. *McKinney v. Lanning, 170*
7. *Easement.—Extinguishment.—Adverse Possession.—Revivor of Easement.—Conveyance.—Deed.*—Where A conveyed a strip of land off his lot to B, adjoining B's lot, to be used as a driveway, reserving to himself, his heirs and grantees an easement in said way for driving, etc., and B and his grantees have continuously, for more than twenty years, claimed the ownership in fee thereof, and for such time held exclusive and adverse possession thereof, denying the enjoyment of the easement, the easement, having been extinguished by adverse possession, can not be revived by a grantee of B by a reference to the reservation in A's deed to B. *Ib.*
8. *Conveyance.—Deed, Recitals in.—Estoppel Only as Between Parties or Privies to Conveyance.*—The reference to the reservation in A's deed by a subsequent conveyance by one of B's grantees, can not be set up as an estoppel by the grantees of A, they not being parties or privies to the conveyance; for no one can set up another's act or declaration as a ground of estoppel, unless he has himself been misled or deceived by such act or declaration. *Ib.*
9. *Possessory Action.—Title.—Recovery.*—One must recover, if at all, on the strength of his own title, and not on the weakness of his adversary's. *Ib.*

RECEIVER.

See CORPORATION, 6.

1. *Sale on Execution or Decretal Order.—Receiver to Collect Rents and Profits, etc., During Year for Redemption.*—The statute gives the owner of real estate sold on execution or decretal order the right of possession during one year from the date of sale, during which time he has the right of redemption, and it is only in a clear case of necessity, in order to protect the rights of others, that the owner ought to be deprived of this right by taking from him his property and placing it in the hands of a receiver. If, in any event, it would be proper to appoint a receiver to collect the rents and profits during the year for redemption, the rents and profits should be paid into court for the use of the person entitled thereto. *Sellers v. Stoffel, 468*
2. *Sufficiency of Application.—Foreclosure of Mortgage.—Rents and Profits.*—While the allegations in an application for a receiver may be supplemented and enlarged by affidavits and oral testimony, yet the appointment can not be sustained if the allegations fail to show statutory or equitable grounds upon which it may stand; and where the only allegations as to the appointment of a receiver, in an action to foreclose a mortgage, are "that said premises can be rented from \$8 to \$12 per month, and asks that a receiver be appointed by this court to take charge of said premises and collect said rent and pay the same into court to be ap-

plied on said mortgages," no case is made justifying such appointment. *Ib.*

RECORD.

See BILL OF EXCEPTIONS, 2, 3; JUDGMENT, 3; PLEADING, 1; REPORTER'S LONGHAND MANUSCRIPT.

RECOVERY.

See FRAUDULENT CONVEYANCE, 3; REAL ESTATE, 9.

REDEMPTION.

See JUDGMENT, 5; QUIETING TITLE, 6; RECEIVER, 1.

REFORMATION OF DECREE.

See JUDGMENT, 6.

REFORMATION OF INSTRUMENT.

1. *Deed.—Description.—Mistake of Fact.—Married Woman.*—Where, by inadvertence of the scrivener in the preparation of a deed, and by mutual mistake of all the parties thereto at the time of the execution thereof, the description of the premises conveyed was erroneously stated as the "undivided three-fifths," while the description intended and believed by the parties at the time of the execution of the deed to be duly stated therein was "the undivided four-fifths," the deed may be reformed so as to express the mutual intentions of the parties, even though such relief be sought against a married woman. *Parish v. Camplin, 1*
2. *Mistake of Fact.—Deed.—Description.*—Even if the parties knew that the deed read "three-fifths" instead of "four-fifths," it constitutes a mistake of fact, and not a mistake of law, if the parties really thought the deed sufficient to convey the "four-fifths," and would entitle the plaintiff to a reformation in that respect. *Ib.*
3. *Mistake of Fact.—Mistake of Law.—Relief.—Deed.—Omission of Grantor's Name from Body of.*—Equity requires such amendment of a writing (a deed) as will make the contract (the conveyance) what the parties supposed it was, and intended it should be, whether the mistake be one of law or of fact. So, where one of the grantors, a married woman, and her husband, joined in the execution of the deed, but their names do not appear in the body thereof, and appear only where they signed it and in the certificate of acknowledgment by the notary, the deed should be reformed so as to express the mutual intentions of all the parties. *Ib.*

REMAINDER.

See CONVEYANCE, 1, 3, 4, 7.

REMAINDERMAN.

See CONVEYANCE, 2.

REMEDY.

See ACTION, 3; BOARD OF CHILDREN'S GUARDIANS, 4; INJUNCTION, 3; INTERROGATORIES TO JURY.

Choice of Concurring Remedies.—Effect of.—Where there are concurring effectual remedies, the choice and uninterrupted prosecution of one excludes the other.

American Furniture Co. v. Town of Batesville, 77

REMONSTRANCE.

See INTOXICATING LIQUORS, 1, 3; HIGHWAY, 1.

RENTS AND PROFITS.

See RECEIVER, 1, 2.

REPEAL BY IMPLICATION.

See STATUTE, 1.

REPLY.

See CONTRACT, 3.

REPORTER'S LONGHAND MANUSCRIPT.

See EVIDENCE, 5.

How Made Part of Record.—Bill of Exceptions.—There is no mode of bringing the evidence taken by an official reporter to this court except by embodying it in a proper bill of exceptions.

City of Alexandria v. Cutler, 568

RES ADJUDICATA.

See FORMER ADJUDICATION.

RES GESTÆ.

See EVIDENCE, 2.

RULES AND REGULATIONS.

See MASTER AND SERVANT, 11.

SALE.

See CONVEYANCE, 4; SALE, JUDICIAL; SALE ON EXECUTION; SALE, VOID; SHERIFF'S SALE; STATUTE OF LIMITATIONS, 6; TAX SALE.

1. *Power of in Will.—Conveyance.—When in Fee.—Real Estate.*—Where the power of sale given to the widow by the will of her deceased husband is clear and absolute, without conditions or limitations, a conveyance in fee will be upheld, whether the widow holds the fee or a life estate. *McMillan v. Deering & Co., 70*
2. *Power of.—Life Estate.—Conveyance in Fee.—Consideration.—Presumption.*—If she hold but a life estate, and the deed purports to convey the fee, it will be presumed that the conveyance has been made pursuant to the power without an express statement in the deed that such was the intention, without reference to the power. Such presumption, however, must arise from considerations entirely independent of the price paid, unless the consideration paid is entirely disproportionate to the value of the fee, and is proportionate to the value of the life estate, in which case it would probably be a circumstance to be considered in rebuttal of the presumption which arises independently of the values. *Ib.*
3. *Void Deed.—Unsoundness of Mind of Grantor.—Not Judicially Declared So.—Knowledge by Grantee.*—It can not be maintained that the deed, in such conveyance, was void because of the insanity of the grantor, the widow, where it does not appear that the widow had ever been adjudicated a person of unsound mind, or that the grantee knew of her alleged unsoundness of mind. *Ib.*
4. *Conveyance.—Color of Title.—Voidable Deed.—Power of Sale.*—The power expressed in the will, the execution of the deed pursuant to that power, and a subsequent purchase by one unacquainted with the mental condition of the grantor, give colorable title which is at most only voidable, and not void. *Ib.*
5. *Will.—Conditional Fee.—Power of Sale.—Quieting Title.*—In such case, where the will provided: "I give and bequeath to my beloved wife, * * all the property, moneys and effects that I may be possessed of at my death, to dispose of at her own discretion, and if she see cause to sell the real estate, I hereby authorize her to do so, * * without order of court; and after the death of my wife, * * the remaining property to be divided between

my two daughters, * * to them and their heirs," the daughters, or the heirs of either or both of them, are not the unqualified owners of the fee of such land, so as to be entitled to have their title thereto quieted, and can not become such owners so long as the widow lives and may execute the power conferred by the will. *Ib.*

SALE, JUDICIAL.

See JUDGMENT, 5; TITLE, 1, 2.

SALE ON EXECUTION.

See RECEIVER, 1; STATUTE OF LIMITATIONS, 1, 2.

Foreclosure Decree.—Sheriff's Sale.—A sale on a decree of foreclosure is a sale on execution within the meaning of the statute.

Moore v. Ross, 200

SALE, VOID.

See MARRIED WOMAN, 3.

SCHOOL FUND MORTGAGE.

See MARRIED WOMAN, 3.

SHERIFF'S SALE.

See SALE ON EXECUTION.

SPECIAL FINDING.

See FRAUDULENT CONVEYANCE, 3; SUPREME COURT PRACTICE, 4.

1. *General Finding Disregarded.*—Where special findings are demanded and made, a general finding will be disregarded.

Stephenson v. Boody, 60

2. *How Considered with Reference to Time.*—Special verdicts should be read and considered with reference to the issue as tendered by the complaint and answers, and as addressed to the time when such issue was tendered, and not with reference to subsequent conditions, unless such conditions affirmatively appear to have changed the status of the parties or the facts constituting the issue.

Miller v. Richards, 263

3. *Power of Court to Amend.—Cases Modified.*—A trial judge may, in all cases, amend his special findings of facts and conclusions of law at any time before final judgment and during the period within which a bill of exceptions containing the evidence may be filed.

Wray v. Hill, 85 Ind. 546, and decisions following that case, modified.

Thompson v. Connecticut Mut. Life Ins. Co., 325

4. *Signing by Judge.—When Required.*—The law requires a special finding to be signed by the judge, where it is not made a part of the record by bill of exceptions or order of the court.

Ferris v. Udell, 579

5. *When Sufficiently Signed.—Signature Following Conclusions of Law.—Venire de Novo.*—Where the conclusions of law stated immediately follow the finding of facts, and the judge's signature immediately follows the conclusions of law, if such signature is not a sufficient signing of the special finding, it was a defect in matter of form, and the remedy was by motion for a *venire de novo*, and, in the absence of such motion, the special finding and conclusions of law are sufficient to present the questions involved in them, on appeal.

Ib.

6. *Conclusions of Law.—When Disregarded.*—A statement in a finding of facts that if the defendant is permitted to do certain things the plaintiff is without any adequate remedy, except the one he seeks

to avail himself of is not a finding of fact but a conclusion of law and has no effect. *Gas Light, etc., v. City of New Albany, 660*

SPECIAL VERDICT.

1. *Instruction as to.*—Where the trial court submits two forms of special verdict with instruction to take either or modify either, or write one for themselves, but that they would "hardly be driven to this labor unless neither of the forms submitted states the facts proved in the form you prefer to state them," the instruction is not open to the objection that it intimates to the jury that they should adopt one or the other of the forms submitted.
Pittsburgh, etc., R. W. Co. v. Burton, Admx., 357
2. *Preponderance of Evidence.—Effect of Omission to Find Fact.*—An instruction that "if, on any material fact, the evidence is equal, so that there is no preponderance, you are not at liberty to find and state that fact in your special verdict," is not erroneous, as the failure to state the existence of a fact is equivalent to a finding that the fact is not proved by a preponderance of the evidence. *Ib.*
3. *Instruction as to What Should be Returned.*—An instruction to a jury, where a special verdict is demanded, that all facts asserted by the plaintiff, if proved, should be returned and the facts asserted and not proved should be omitted, is correct. *Ib.*
4. *Instruction as to Forms Submitted.*—An instruction to a jury who are directed to return a special verdict, that "You are not required to find any fact to be proved because you find the same suggested in a verdict, or in the verdict of the party you desire to favor," and that "If you do not consider that one of the forms submitted to you speaks the truth, as you understand it, you can not adopt it as your verdict," is not, properly construed, erroneous. *Ib.*
5. *Conclusions Disregarded.*—A mere conclusion stated in a special verdict as a finding will be disregarded. *Ib.*
6. *Omission of Essential Facts.—Venire De Novo.*—Omitted essential facts do not vitiate a special verdict and a motion for a *venire de novo* will not lie therefor. *Jones v. Casler, 382*
7. *Improper Findings Disregarded.*—Improper findings, such as conclusions, opinions or evidentiary facts in a special verdict will be disregarded, and a motion for a *venire de novo* on account thereof will not be granted. *Ib.*
8. *Finding of Fact.—Presumption as to Evidence.*—Where a jury, in a special verdict, finds a fact to exist which the law requires to be proved by a certain number of witnesses, it is not necessary that the finding should state that such fact is proved by that number of witnesses, as it will be presumed that the finding that the fact exists is based upon the requisite proof. *Ib.*

SPECIFIC PERFORMANCE.

See REAL ESTATE, 5.

STATE BOARD OF TAX COMMISSIONERS.

See TAXES, 1.

STATUTE.

1. *Revision and Substitution.—Repeal by Implication.*—Where a new act covers the whole subject-matter of an old one, and it is evident that the Legislature intended to revise the old act, and substitute therefor the new, the prior act is thereby repealed without any express words to that effect. *Thomas v. Town of Butler, 245*

2. *Agricultural Lands Within Town or City.—Taxation of.—Repeal of Statute.*—The act of April 16, 1881 (Acts 1881, p. 698), relating to the taxation of agricultural lands lying within the limits of a city or incorporated town, being a revision of, and intended as, a substitute for the act of March 21, 1879 (Acts 1879, p. 94), upon the same subject, operated to repeal the last mentioned act, and the express repeal of the act of 1881 by the act of March 9, 1891 (Acts 1891, p. 398), extinguished both of the prior acts, and such lands thereafter were subject to taxation by a town or city as other property. *Ib.*

STATUTE CONSTRUED.

See CRIMINAL LAW, 2; SUPERIOR COURT; TAXES, 2.

STATUTE OF FRAUDS.

See TRUST, 4.

STATUTE OF LIMITATIONS.

See CONVEYANCE, 2, 5; REAL ESTATE, 6.

1. *Ten Year Statute.—Execution Sale.—Real Estate.—Misdescription.*—Where the judgment debtor brings action to recover real estate sold on execution, and it appears that the whole parcel, 15x60 feet, was sold on execution against her, though there was an evident mistake in the sheriff's deed, the description therein being 15x15 feet, possession being taken and retained under it for more than ten years before the commencement of suit to test the validity of the sale, the action is effectually barred by the ten-year statute of limitation. *Moore v. Ross, 200*
2. *Execution Sale.—Statute Runs from Time of Sale.*—In such case the statute of limitations begins to run from the time of sale, and not from the time the deed is executed. *Ib.*
3. *Possessory Action.—Private Way.—Easement.—Six-Year Statute.*—In an action to recover the possession of an easement, a private way, the possession of which has been disturbed, the six-year statute does not apply. Section 293, R. S. 1894. *Miller v. Richards, 263*
4. *Fraud.—Ignorance of.*—In suits in equity, where a party has been injured by the fraud of another, and such fraud is concealed, or is of such a character as to conceal itself, whereby the injured party remains in ignorance of it without fault or want of diligence, the statute of limitations does not begin to run until the fraud is discovered, even though there be no affirmative acts of concealment. *Dorsey Machine Co. v. McCaffrey, 545*
5. *When Question of Raised by Demurrer and When Not.*—Where a complaint shows upon its face that the action was commenced after the time limited, the question can be raised on demurrer, provided the statute is absolute, having no exceptions; if there be exceptions, however, and the complaint does not show that the action is not within any of, them, a demurrer will not raise the question. *Ib.*
6. *Corporation.—Sale of Stock.—Fraud.—Affirmative Concealment.*—Where the president of a corporation, acting as such to induce an infant, inexperienced in business affairs, to purchase the corporation stock, and to mislead such infant as to the facts, falsely and fraudulently represents that the corporation is solvent and prosperous, but that the purchaser must not expect any dividends for three years, as it was intended to increase the business of the corporation, and the purchaser relies upon such representations and makes no investigation, there is such concealment as post-

pones the running of the statute of limitations until the discovery of the fraud. *Ib.*

STREET CROSSING.

See RAILROAD, 1, 2, 3.

STREET RAILROAD.

See INJUNCTION, 1.

STREETS AND ALLEYS.

See INJUNCTION, 1; PRECEPTS FOR STREET ASSESSMENTS; RAILROAD, 8.

STRUCK JURY.

See JURY, 1.

SUBROGATION.

See MORTGAGE, 1; PARTIES, 1.

SUMMONS.

See PROCESS.

SUPERIOR COURT.

Jurisdiction, Concurrent.—Tax Deed.—Quietting Title.—Circuit Court.—Statute Construed.—An action to quiet title to land held under a tax deed may be brought in the superior court. The act of December 21, 1872, providing that such suit may be instituted in the circuit court of the county where the land lies, does not destroy the former act of February 15, 1871, conferring original concurrent jurisdiction of such class of cases upon the superior and circuit courts. *Browning v. Smith, 280*

SUPREME COURT PRACTICE.

See CONSTITUTIONAL LAW.

1. *Evidence not in Record.—Questions Depending Upon.*—Questions depending upon the evidence can not be decided where the evidence is not in the record. *Bronnenburg v. O'Bryant, 17*
2. *Partition.—Exception to Commissioners' Report.—Affidavits Pro and Con not in Record.*—Alleged error of commissioners in partition is not duly presented for consideration where the affidavits in support of and against the exceptions to the report of the commissioners are not made a part of the record. *Bower v. Bowen, 31*
3. *Evidence.—Offer to Prove, etc.—When no Question Presented.—Partition.*—Where it is alleged that the court erred in refusing a trial on exceptions to the report of commissioners in partition, except by affidavits, the appellants are not in a situation to complain of the alleged error, where it is not shown in the record (1) that they in any way offered to support their exceptions by proof other than affidavits, (2) who the witnesses are that they offered in support of their exceptions, nor what they would testify to, and whether they were competent or not. *Ib.*
4. *Special Findings.—Same Questions Upon Pleadings.*—Where the same questions are presented on the special findings and conclusions of law that arise on the demurrers to pleadings, the rulings upon the demurrers are immaterial. *Stephenson v. Boody, 60*
5. *Appeal.—Parties to Judgment.—How Ascertained.*—In order to ascertain who the parties are to a judgment appealed from, the appellate tribunal will look through the record to the pleadings, and, if necessary, to the summons. *Bozeman v. Cole, 187*
6. *Reversal of Judgment.—Prejudicial Error.—Harmless Error.—Striking Out Paragraphs of Answer.*—To authorize a reversal of the

judgment it is necessary not only that the appellant should show that the court erred, but he must show that the error was of such a character that it probably injured him. The error, if any, in striking out a paragraph of answer is harmless where the special finding shows that the facts averred therein did not exist; and the same is true of a paragraph stricken out, where the material averments thereof are contained in another paragraph upon which issue is joined.

Levi v. Drudgt, 458

7. *Answer Questioned for First Time on Appeal.*—The sufficiency of an answer can not be questioned for the first time on appeal.

Miller v. McDonald, 465

TAXES.

See STATUTE, 2.

1. *Law of 1891.—Constitutionality of Act.—State Tax Board.—Cases Followed.*—The questions presented by the complaint in this case as to the powers, duties, privileges and procedure of the State Board of Tax Commissioners under the act of March 6, 1891 (Acts 1891, p. 199), and as to the constitutionality of said act, are the same as those decided in *Cleveland, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 513; *Indianapolis, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 609; *Pittsburgh, etc., R. W. Co. v. Backus, Treas.*, 133 Ind. 625; which cases are here followed.

Evansville, etc., R. R. Co. v. West, Treas., 254

2. *Delinquent Taxes.—Penalties and Interest.—Law of 1891 Construed.*—Under the tax law of March 6, 1891 (Acts 1891, p. 199), considering it as a whole, nonpayment of the April installment carries into delinquency the whole tax, to which is added a penalty of ten per centum; if such taxes are not paid, but are still delinquent in November, an additional burden of six per centum thereon is imposed; if the April installment is paid, and only the November installment is delinquent, but ten per centum can be added; and to these penalties no additions can be made in the way of either penalties or interest, however long the delinquency continues.

Ib.

3. *Payment "On Account."—Effect of Such Payment.*—Where, within the time for paying the April installment of taxes, a payment is made to the treasurer equal to such installment, with instructions to apply the same "on account," the law is complied with, and the whole tax does not become delinquent, though the sum paid is not actually applied to April installment. It is otherwise, however, if a sum less than such installment is paid.

Ib.

TAX SALE.

See QUIETING TITLE, 7.

Nonresident Bidder.—Must Comply with Statute Relating to.—Illegal Sale.—A sale of land by a county treasurer to a person not a resident of this State for delinquent taxes, unless such nonresident, before bidding, shall have filed a written agreement consenting to the jurisdiction of the circuit court of the county and an appointment of a citizen of the county, as his agent, upon whom service of process may be had in any suit connected with the sale, as provided in section 8603, R. S. 1894, is illegal.

Shedd v. Disney, 240

TENANTS BY ENTIRETIES.

See FRAUDULENT CONVEYANCE, 2; MORTGAGE, 2.

TENANTS IN COMMON.

See PARTITION, 1.

THEORY.

See CONTRIBUTORY NEGLIGENCE, 3; NEGLIGENCE, 8.

TITLE.

See CONVEYANCE, 7, 8; EVIDENCE, 2; PARTITION, 3; REAL ESTATE, 6, 9;

TITLE, COLOR OF.

1. *Judicial Sale.—Authority to Make.*—Title under a judicial sale can not be maintained without an affirmative showing that the sale was made upon a writ authorized by the judgment.
Burt v. Hasselman, 196
2. *Judicial Sale.—Authority to Make.—Deed.*—While the deed may be evidence of the sale, yet it is not evidence of the power or authority to make it. *Ib.*
3. *Notice.—When One is Put on Inquiry.—Deeds Referred to.—Search.*—A person is regarded as notified of whatever appears on the instruments which constitute his chain of title, and whatever is sufficient to put him on inquiry is sufficient to charge him with whatever an ordinarily diligent search would have disclosed; and all deeds referred to as being in any way connected with the title, as well as those upon which the title is based, must be examined as to any facts they may contain, at the purchaser's peril.
Mettart v. Allen, 644
4. *Failure to Search Records.—Equitable Relief.*—Where it was a person's duty to search the records, which he did not do, he can not invoke the aid of a court of equity to relieve himself from the consequences of his own want of care. *Ib.*
5. *Recitals in Mortgages, When Sufficient to Put Purchaser on Inquiry.—Notice.—Incumbrances.*—That certain mortgages contain recitals of facts which made it a purchaser's duty to make an examination of the records to ascertain if there were any existing incumbrances upon the premises conveyed, see opinion. *Ib.*

TITLE, COLOR OF.

See SALE, 4.

TOWN.

See NUISANCE, 1.

TOWNSHIP TRUSTEE.

See MANDAMUS.

TRESPASSER.

See NEGLIGENCE, 8.

TRIAL.

Postponement After Commencement from One Term to Next.—Sick Juror.—Under section 1379, R. S. 1881 (Burns R. S. 1894, section 1442), the trial court has power, where a trial requiring many days is commenced on the next to the last day of a term, and a juror becomes ill and unable to then serve, to postpone the further hearing to a day in the next term, and to order the jury and witnesses to then attend and conclude the trial.

Dorsey Machine Co. v. McCaffrey, 545

TRUST.

See WILL, 1, 2, 4.

1. *When Trustee Entitled to Compensation for Services in Trust Capacity.—Quantum Meruit.*—Where a person accepting a trust is not a beneficiary under the instrument creating the trust, and

there is no agreement in relation to compensation of the trustee for his services, but he expected to be compensated therefor, and never understood that he was expected to serve gratuitously, the trustee is entitled to recover the reasonable value of his services in his trust capacity. *Premier Steel Co. v. Yandes, 307*

2. *Compensation of Trustee.—Primary Liability for.—Mortgage.*—Where the labors of a trustee named in a mortgage securing certain bonds consisted largely in doing the things which the mortgagor covenanted to do, such as keeping up the insurance on the mortgaged property, paying taxes, etc., because of the default of the mortgagor to do the same, the charges for compensation ought to be primarily against the mortgagor, or the mortgaged property. *Ib.*
3. *Compensation of Trustee.—Fund Primarily Liable Therefor.*—Whether the claim of the trustee for compensation is primarily against one fund or another depends upon the facts of each particular case, i. e., the character of the services rendered by the trustee. *Ib.*
4. *Conveyance of Real Estate.—Aged Grandmother to Grandson.—Without Consideration.—Parol Agreement.—Statute of Frauds not a Cloak for Fraud.*—Where a woman seventy-eight years old, who could neither write nor read writing, and her husband being eighty-two years old, conveyed her real estate, her husband joining, to her grandson, at his suggestion, he being an active, energetic business man in whom she had great confidence, he proposing to take care of it, see to the liens and taxes, and sell it for her and account to her for the proceeds, and would charge her for just what his services were worth, and at any time she should want the property back he would convey to her all that remained unsold, no trust being expressed in the deed,—the grandson holds the land in trust for his grandmother, and the statute of frauds will not serve as a cloak for his own fraud when he repudiates the trust and claims title in his own right. In such case, the conveyance will be set aside, except as to such land as the trustee has sold. *Giffen v. Taylor, 573*

TRUSTEE.

See WILL, 1, 2, 4.

UNDUE INFLUENCE.

See CANCELLATION OF INSTRUMENT, 1.

UN SOUNDNESS OF MIND.

See SALE, 3.

UTTERING FORGED INSTRUMENT.

See CRIMINAL LAW, 1.

VARIANCE.

See PARTIES, 2; QUIETING TITLE, 6.

Amendable.—Decree.—Collateral Attack.—Quieting Title.—Misdescription.—Where, in an action to quiet title, the land is misdescribed in the complaint, but is correctly described in the decree, the decree can not, on account of such variance, be collaterally attacked, and, on appeal, such variance would be deemed amended. *Browning v. Smith, 280*

VENDOR AND VENDEE.

See PURCHASER PENDENTE LITE.

VENIRE.

See JURY, 1.

VENIRE DE NOVO.

See SPECIAL FINDING, 5; SPECIAL VERDICT, 6.

VICE PRINCIPAL.

See NEGLIGENCE, 4.

VIEWERS.

See HIGHWAY, 3, 4.

WAIVER.

See QUIETING TITLE, 3.

WATERCOURSE.

See BRIDGE, 1, 8.

WATERWORKS.

See CORPORATION, 6.

WATERWORKS COMPANY.

See MUNICIPAL CORPORATION, 4, 5, 6.

WAY BY NECESSITY.

Action to Recover.—Essential Elements.—Damages.—While injury is probably an essential element in a proceeding to establish or recover a way by necessity, yet the recovery of damages is not an indispensable accompaniment. *Miller v. Richards*, 263

WAY, PRIVATE.

See STATUTE OF LIMITATIONS, 3.

WILL.

See ESTOPPEL, 1, 2; SALE, 1, 5.

1. *Trust.—Home for Unfortunates.—Board of County Commissioners Competent to Act as Trustee.*—A board of county commissioners in this State is competent to act as a trustee under the will of an individual, where the object of the trust is to establish a home for worthy, unfortunate persons and orphan boys.
Board, etc., v. Dinwiddie, 128
2. *Beneficiaries.—Selection in Discretion of Trustee.*—A failure in the will to confine the beneficiaries of the trust to residents of the county does not invalidate the trust, and certainly not where the board of commissioners is made the judge of everything that is necessary relating to the trust, and is given full discretion in the selection of the beneficiaries from the class of persons named. *Ib.*
3. *Bequest of National Bank Stock.—Right to Hold.—Perpetuities.*—A bequest to a board of county commissioners, as trustee, of stock in a National bank "to be kept as a perpetual fund, to remain in said bank while it exists," does not invalidate the gift, even though, under the banking laws, a corporation can not hold such stock, where the will invests the trustee with discretion as to what is necessary to be done. Nor does this provision violate the statute against perpetuities. *Ib.*
4. *Church.—Provision Requiring Trustee to Build.*—A trust created by will in a board of county commissioners whereby a home is to be provided for worthy, unfortunate persons and orphan boys is not rendered invalid by a provision requiring a church to be built in connection with the home. *Ib.*

5. *Partial Intestacy.—Presumption Against.—Meaning of Testator.*—In interpreting wills the presumption is always against partial intestacy, and the meaning of the testator must be sought from the whole instrument. *Ib.*
6. *Disposition of Entire Estate.—Construction of Will.*—A testatrix after disposing of her home farm to a board of county commissioners, as trustee, and providing for the establishment of a home by them for the benefit of a class of persons, then devised to named nephews in trust "all my remaining estate to be managed by them as by me directed." The directions being to handle the property without sacrifices, and, when they were through with the trust, to "turn all over to the commissioners * * * for the benefit of the needy with as little cost as possible."
Held, that the will disposes of all of the testatrix's property. *Ib.*
7. *Husband and Wife.—Contract as to Disposition of Wife's Estate.—Effect Upon Husband's Inchoate Interest.—Election by Husband to Take Under Will.—Rights of Husband's Judgment Creditors.*—Where a wife executes a will devising all of her estate excepting a bequest of one hundred dollars to the husband, to her children and grand children, in pursuance of a written contract between herself and husband whereby, in consideration that she should so devise her estate, he would relinquish all interest which he could take by virtue of the statute of descents, and upon her death he elects to accept the provisions of the will, as provided by the act of March 4, 1891, amending section 2485, R. S. 1881 (Acts 1891, p. 71), no interest in the wife's real estate vests in him but the property goes to the devisees free from any claim by the husband's judgment creditors. *Huffman v. Copeland*, 221
8. *Destruction of.—Establishment and Probate.—Complaint.*—A complaint to establish and probate a will alleged to have been executed by the testatrix, and fraudulently destroyed after her death, sufficiently shows the existence of the will at the death of the testatrix. *Jones v. Casler*, 382
9. *When Only Substance of Will Need be Pleaded and Proved.—Evidence.*—A complaint to establish and probate a lost or destroyed will is not required to set out the exact words, but it will be sufficient where no copy has been preserved if the substance of the will be pleaded, showing the disposition made of the property, and it will also be sufficient if the proof follow the pleading and be made as required by statute. *Ib.*
10. *Allegation as to Residence of Testator.*—A complaint to establish and probate a will alleged to have been fraudulently destroyed by the defendant is not bad for failing to allege the county and State wherein the testatrix died. *Ib.*
11. *Proof of Part of Will Fraudulently Destroyed.*—If part of the provisions of a will are proved according to law such part will be given effect as against the fraudulent destroyer of the will. *Ib.*
12. *Construction of.—Devisees.—Partition.—Residue to "Legal Heirs."*—Where a husband devises all his real and personal property to his wife for life or as long as she remains his widow, and provides that at her death or marriage his only son shall have his choice of forty acres in a division of the land to be made east and west, "and the residue to be divided equally amongst all" his "legal heirs," which consisted, besides the son, of eight grandchildren,—the son is entitled to forty acres to be selected by him, and no more; and the remaining real estate goes in equal shares to the grandchildren or their grantees, in which the son is not entitled to share. *Griffin v. Ulen*, 565

13. "*Heirs*," *How Construed*.—In a will, the force of the word "heirs" may be controlled by the context. *Ib.*

WITNESS.

See INSTRUCTIONS TO JURY, 3.

WOMAN, LICENSE TO SELL.

See INTOXICATING LIQUORS, 10.

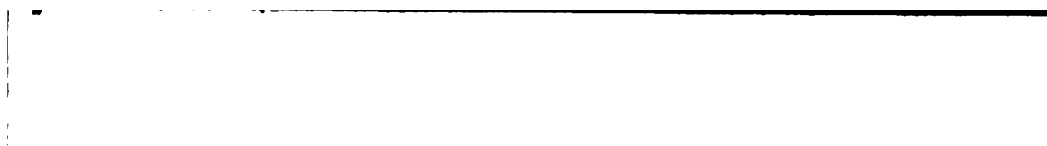
WOMAN, SALE TO.

See INTOXICATING LIQUORS, 9.

G. L. E.

END OF VOLUME 139.

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